立教法学　60号（2002）

Determination of the Dispute in the Southern Bluefin Tuna Case

Atsuko Kanehara

I　Introduction

①　On August 31, 1998, the Southern Bluefin Tuna (SBT) case arose with two *Statements of Claim and Grounds on Which They are Based* by Australia and New Zealand (A/NZ) delivered to Japan. A/NZ commenced the arbitration proceedings against Japan under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Pending the constitution of the Arbitral Tribunal (AT), A/NZ each filed a request for the prescription of provisional measures with the International Tribunal for the Law of the Sea (ITLOS) under Article 290 (5) of UNCLOS. On August 27, 1999, ITLOS prescribed certain provisional measures finding that this AT would have jurisdiction.[1] AT decided that it was without jurisdiction to rule on the merit of the dispute on August 4, 2000.[2]

The core of this dispute consisted in the determination of the dispute : identification of the subject of the dispute and the determination of the governing law over the dispute as well.[3]

Under Article 290 (5) of UNCLOS ITLOS may prescribe provisional measures only if it considers that *prima facie* the arbitral tribunal which is to be constituted would have jurisdiction. Above all things, that a dispute concerns the interpretation or application of UNCLOS is the prerequisite for an arbitral tribunal established under Annex VII of UNCLOS to have jurisdiction. Japan, on the one hand, and A/

NZ, on the other hand, agreed that there was a dispute, but they were divided concerning the characterization of the dispute. While Japan defined it as a dispute falling under the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT), A/NZ defined it as not only falling under CCSBT but also under UNCLOS.

② This article will examine the determination of the dispute in the SBT case. The focus will be placed upon the issue of jurisdiction *ratione materiae*：whether the dispute concerns the interpretation or application of UNCLOS. In addition, other related issues will be also dealt with, such as, those of rights which should be preserved by provisional measures, mootness of the case and the legal nature of the dispute, as far as they hold any relevance to the determination of the dispute.

After confirming critical importance of jurisdiction *ratione materiae* for setting in motion the dispute settlement procedures established under UNCLOS in II, a succinct analysis of the relevant precedents will be provided in III. Then, based upon an overview of the facts of the SBT case in IV, the Order of ITLOS and the Award of AT will be examined, in depth, in V and VI.

II Cardinal Importance of Determination of a Dispute for Application of the Compulsory Dispute Settlement Procedures under UNCLOS

① The requirement that a dispute concerns the interpretation or application of UNCLOS must be satisfied for any tribunals or International Court of Justice (ICJ), as enumerated by Article 287 (1) of UNCLOS, to have jurisdiction *ratione materiae* over a dispute. It has been posited that as for a guiding principle to interpret this requirement, the following facts are emphasized for consideration：the intention of UNCLOS to provide compulsory dispute settlement procedures, *constitutionality* of UNCLOS over the laws of the sea and inclusiveness of UNCLOS in touching upon all the issues of the law of the sea.[4)] Despite these facts, however, it could not be overemphasized that the intention of the State Parties to UNCLOS is to accept its compulsory dispute settlement procedures as the only means, for resolving disputes concerning the interpretation or application of UNCLOS. It would not necessarily admit any all-inclusive or too broad an interpretation of this requirement, which would make it meaningless as *a requisite* at all. Certainly, issues concerning the law of the sea are voluminous and various as well. This indeed accounts for the cardinal importance of the requisite in order to find a dispute actually concerning the interpretation or application of UNCLOS exercising all precision and caution.

The relevant treaty practices have been developed both before and after UNCLOS, relating to the law of the sea issues. The point is that many of them has established their own dispute settlement procedures within their treaty systems.[5] Unless otherwise shown, the State Parties to these treaties doubtlessly intend that disputes under these treaties will be settled by their own mechanisms. The State Parties to those treaties presuppose, in relation to the dispute settlement procedures under UNCLOS, that a distinction can be maintained between a dispute under UNCLOS and one under individual treaties. What this means is that a dispute concerning the interpretation or application of individual treaties on the law of the sea never automatically forms a dispute concerning the interpretation or application of UNCLOS. If such a presupposition could not be sustained, the dispute settlement procedures of those individual treaties would lose significance to a great degree.[6]

All the more, in considering the compulsory nature of the dispute settlement procedures under UNCLOS, to find a dispute concerning the interpretation or application of UNCLOS will require every prudence. After AT determined that the SBT dispute was not only a dispute of CCBST but also of UNCLOS, nonetheless, in order to justify its interpretation of the terms "exclude any further procedure" in Article 281 (1) of UNCLOS, it emphasized the importance of respecting the dispute settlement procedures under individual treaties in stating that：

> To hold that disputes implicating obligations under both UNCLOS and an implementing treaty such as the 1993 Convention——as such disputes typically may——must be brought within the reach of section 2 of Part XV of UNCLOS would be effectively to deprive of substantial effect the dispute settlement provisions of those implementing agreements which prescribe dispute resolution by means of the parties' choice.[7]

While AT admitted the concurrent jurisdiction *ratione materiae* of dispute settlement procedures of both UNCLOS and CCSBT, it maintained and respected the essence of the procedures under CCSBT, such as voluntary nature of aribtral and judicial procedures, when interpreting Article 281 (1) of UNCLOS.

In general, unless an individual treaty on the law of the sea constitutes a self-contained regime, any dispute settlement procedures other than its own procedure is not necessarily excluded from being applied even to a dispute under the treaty.[8] In particular, however, when procedures both under UNCLOS and under an individual treaty are given their own jurisdiction *ratione materiae*, namely, jurisdiction over a dispute concerning the interpretation or application of UNCLOS and jurisdiction over a dispute concerning the interpretation or application of the treaty, there is

more to be discussed.

There are many questions to be examined. How to determine, or how to characterize a dispute, whether a dispute of UNCLOS or a dispute of an individual treaty, and by whom? What are the relevant factors to be considered to determine a dispute? In addition to these general questions, the following issues, for instance, may be raised. Can a single dispute be a dispute of treaty A and, at the same time, a dispute of treaty B? Is the answer true also for an element or a particular point of which a dispute consists?

Only on the premise that a dispute can have a double nature, namely being a dispute of both UNCLOS and an individual treaty as well, not only procedures under UNCLOS but also those under the treaty might be given jurisdiction at the same time over the single dispute. Can, in the same way, a particular point or subject to be decided have a double nature? Even if an individual or particular subject or a point to be decided may have only a unique nature, a dispute can have a double nature. This is the case, when a dispute consists of several elements——when subject X is concerning the interpretation of UNCLOS and subject Y is concerning the interpretation of another treaty. Since in the SBT case, AT found that there was only a single dispute, and that it had a "double" nature, being a dispute of UNCLOS and a dispute of CCSBT. Whether AT successfully proved this will be examined later.

② An issue of determination of a dispute includes the issue of determination of the governing law over a particular dispute. To satisfy *a requisite* for tribunals to have jurisdiction *ratione materiae*, namely, that a dispute concerns the interpretation or application of a particular treaty ensures that this treaty is exactly the governing law over the dispute. Parties to a dispute make a claim based upon a law that applies to the facts in a pertinent context that has actually raised a conflict between them. When the legal claims oppose each other, there exist a legal dispute. In a case in which parties to a dispute are really divided on the interpretation or application of a treaty, that treaty is the governing law over the dispute. In order to resolve the difference and so to settle the dispute between them, it is indispensable for a court to make a decision in accordance with this governing law.

In this sense, in the SBT case, too, determining the dispute, determining whether or not it was a dispute of UNCLOS held cardinal importance to find jurisdiction *ratione materiae* of AT to entertain the case.

In the SBT case, the object of the complaint by the Applicants was Japan's catch exceeding the TAC previously agreed and Japan's unilateral execution of its EFP program. The act of Japan unilateral fishing, as such, when it is separated from the

pertinent history of the present dispute, may fall under the provisions of UNCLOS and CCSBT, Article 87 of UNCLOS and Article 3 of CCBST, for instance.[9] Compared to this, however, when the act was placed in the particular context of the dispute, what legal claims did it raise concerning *unilateral fishing* on the high seas and regulations or limitations imposed on it, etc？ On what legal ground did the claims of parties really stand and oppose each other？ What was the governing law of the present dispute, UNCLOS or CCSBT？ Here precisely existed the very difference between the Applicants and the Defendant.

In the precedents that bear relevance to an issue of determination of a dispute, the many factors to be taken into consideration are complicatedly interwoven. Among those factors are the genuine relation between the facts that have raised a dispute and an alleged governing law over a dispute, a certain distinction between an issue of applicable law and an issue of a governing law over a dispute, competence to determine a dispute and so on.[10]

In the following section, succinct analysis of the precedents will be provided. This is in order not only to make some comparison with the SBT case but also to circumscribe and specify the points at issue in the SBT case. The precedents that will be dealt with include decisions both at jurisdictional and merits stage. Procedurally and substantially there should be difference depending on whether the decisions are given at jurisdictional or merits stage. Despite this fact, to analyze the basic factors in consideration and certain standards to be applied in determination of a dispute would not lose its significance.

III Some Comparative Analysis of Precedents

(1) Relation between Facts Which Have Given Rise to a Dispute and Legal Claims Formulated by Parties to a Dispute

① AT in the SBT case, by referring to the Oil Platforms Case, confirmed that in the SBT case and in any other case invoking the compromissory clause of a treaty, the claims made, to establish jurisdiction, must reasonably relate to, or be capable of being evaluated in relation to, the legal standards of the treaty in point, as determined by the court or tribunal whose jurisdiction is at issue.[11] It is for AT, according to its view, to decide whether the real dispute between the parties does or does not reasonably（and not just remotely）relate to the obligations set forth in the treaties whose breach is alleged.[12]

② In the Fisheries Jurisdiction case quoted by AT suggested two important factors to be considered in respect to determination of a dispute：first, the signifi-

cance of the context in which a dispute has arisen, and second, the objective basis on which the Court determines a dispute.

Both parties agreed to the existence of a dispute, while they were opposed to each other as to the "characterization" of it.[13)]

The Applicant, Spain, characterized the dispute as one relating to Canada's lack of entitlement to exercise jurisdiction on the high seas, on the one hand, and the Defendant, Canada, contended that the dispute related to its adoption of measures for the conservation and management of fisheries stocks with respect to vessels fishing in the NAFO Regulatory Area and their enforcement. Spain asserted that the issue of an entitlement of Canada to exercise jurisdiction on the high seas could form an independent subject of a dispute, and that Spain directly attacked the legislation, the origin of the Canadian measures and enforcement for fishery conservation not the measures themselves.[14)] Canada opposed the separation of this issue of entitlement and legislation from that of the measures for the conservation and management for fishery stocks, since the two subjects were so inextricably linked to each other that they could not be treated independently.[15)]

At the preliminary stage of the case, to establish the Court's jurisdiction, the main point at issue was the applicability of the Canadian reservation attached to its 1994 declaration of acceptance of the compulsory jurisdiction of ICJ. The relevant part of the reservation provided that "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area" were excluded from jurisdiction of ICJ.[16)] The Applicant, in order to exclude the application of this reservation, formulated the dispute in such a way as not to touch upon the points concerning conservation and management measures taken by Canada that were provided in the Canadian reservation. Thus, the Court, first, had to decide whether this formulation of the dispute by Spain could be sustained. Since the answer was negative, ICJ, second, determined the dispute, examining whether the Canadian reservation could apply to the dispute as properly formulated.

In the Court's view, the power to determine the dispute on an objective basis belonged to the Court.[17)] ICJ exercised this power and determined the dispute almost in line with Canada's formulation of the dispute.

ICJ found that the essence of the present dispute was whether the following Canadian activities violated Spain's rights under international law : the pursuit of *Estai*, the arrest and detention of the vessel and its master and measures taken for accomplishing them, arising from Canada's amended Coastal Fisheries Protection

Act and implementing regulations.[18] In determining the dispute, ICJ reiterated the pertinent context of the dispute. It emphasized that Spanish complaint was given rise to by these specific activities of Canada, and that they constituted the very context in which the legislative enactment and regulations of Canada should be considered.[19] ICJ clearly denied the separation of the Canadian legislative acts and regulations that Spain alleged as violations of international law from this context, the particular event that had triggered the present dispute.[20]

Thus, ICJ did not allow the determination of a dispute in an *abstract* formulation disregarding the pertinent context of a dispute.[21] In the present case, the link which Canada emphasized was found by the Court as the link between the Canadian legislative enactments and regulation, on the one hand, and the Canadian activities determined by the Court as being the pertinent context of the dispute, on the other hand. The reason for the denial by the Court of the Spanish characterization of it, was not because issues of legal entitlement and legislation, as a matter of logic, could not be separated from issues of concrete measures enforced based upon the entitlement and legislation. Although the Judgment did not mention it, the issue of legal entitlement, might, logically at least, be independently and separately litigated before the Court. In addition, a single dispute before the Court may have several subjects, and ICJ may have and exercise jurisdiction over only one of them. Judge Vereshchetin clearly affirmed these points.[22]

As for the significance of a *context* of a dispute, in general, there is no doubt that courts must face particular and real dispute, not hypothetical or academic arguments. Therefore, without the existence of real conflicts between the parties on a certain outstanding question, courts should not answer the question abstractly. In the present case, in particular, if the legal entitlement itself had been the points at which the parties were really divided ICJ should have entertained this real dispute. But this was not the case. Spain tried to define the dispute disregarding its context in order to establish the Court's jurisdiction without being hampered by the Canadian reservation. ICJ dismissed this *subjective* determination by the Applicant of the dispute.[23]

While ICJ stated that it must begin by examining the Application, in its conclusion, it dismissed the Spanish formulation of the dispute. This was done by considering the objective basis of the dispute that enabled the Court to identify the exact nature of the claims and to find a real subject of the dispute.

What, then, is the objective basis on which ICJ determines the dispute dividing the parties? *Objective* means, in the one sense, independence from parties'contentions,

as being opposed to *subjective*. ICJ itself reiterated its own power to interpret the submissions of the parties and to determine the dispute not being necessarily bound by the Application alone. *Objective* means, in the other sense, being free from arbitrariness of the Court in determining the dispute. This objectiveness can be ensured by the Court's full and thorough consideration not only of the claims in the Application but all the relevant instruments and circumstances where the parties could not agree, as well as the various written and oral pleadings placed before the Court.

The objectiveness may be questioned, at this stage, only with regard to the identification of the context of the dispute by the Court, since what ICJ decided, after finding the context of the dispute, was solely the denial of separation of the issue of legal entitlement from that context. Although ICJ stated that the specific Canadian activities had been done in accordance with "Canada's amended Coastal Fisheries Protection Act and implementing regulations," ICJ neither defined nor evaluated yet those activities. The issue as to whether they were among measures for the conservation and management of fishery stocks was one of the interpretative issues relating to the Canadian reservation as was examined later by the Court.

To assure the objectiveness in deciding the context of the present dispute, ICJ, in its turn, might well have more fully demonstrated the objective basis that had convinced the Court that there was not a real conflict between parties as to the issue of the legal entitlement as such alleged by the Applicant.[24)]

In the SBT case, according to the Applicant, the subject of the dispute was defined as legality under UNCLOS of Japan's *unilateral fishing* on the high seas. As stated before, there is no doubt that this issue, as such, logically may be an issue to be evaluated by UNCLOS. However, the question was, considering the particular context of the dispute, whether the legality of Japan's *unilateral fishing* under UNCLOS formed an independent subject to be decided and was the point at which the parties really had been divided. In this regard, on what *objective basis* ITLOS and AT determined that the dispute was one of UNCLOS will be reviewed later.

③ In the Oil Platforms Case, that the event of US attacking and destroying three offshore oil platforms gave rise to the conflict, was not contested. The parties were opposed, in a sense, in the evaluation of the context. The Applicant, Iran, on the one hand, alleged that those oil complexes had been owned and operated for commercial purposes by the National Iranian Oil Company. As a consequence, it claimed that the US had breached the relevant obligations under the 1955 Treaty of Amity, Economic Relations and Consular Rights between the United States of America and

Iran (the 1955 Treaty). Thus, Iran invoked as a basis for the Court's jurisdiction, the compromissory clause of the 1955 Treaty.[25] The Defendant, the US, on the other hand, contended that the attacks and destruction of the oil platforms had occurred in the context of a long series of attacks by Iranian military and paramilitary forces on the US and other neutral vessels engaged in peaceful commerce in the Persian Gulf. Accordingly, for the US, the Iranian claims relating to the use of force did not fall within the ambit of the 1955 Treaty.[26]

Grounded in these conflicting evaluations of the context, the parties differed as to whether the jurisdictional clause in the 1955 Treaty conferred on ICJ jurisdiction *ratione materiae* to entertain the case. The Court should have had to, above all, not only identify but also characterize the context in order to decide its jurisdiction under the 1955 Treaty. In this regard, the present case was different from the Fisheries Jurisdiction case where rather the identification of the context of the dispute was essential for determining the dispute.

In the Court's view, to decide whether it had jurisdiction *ratione materiae* under the compromissory clause of the 1955 Treaty, the followings must be ascertained: "whether the violation of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to" the compromissory clause of the 1955 Treaty.[27] In order to give the latter part of this citation, "whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.....," an independent significance from the former, the latter should be interpreted to mean that the violation of the Treaty pleaded is exactly the point at which the parties are divided and that there is a dispute of that kind.

However, in considering the latter part as having its own meaning, as Judge Oda properly stated in his Dissenting Opinion, ICJ did not determine the dispute itself.[28] What was really the dispute in this case? What were the points at which the parties were divided, and on the basis of what legal rights and obligations did they conflict with each other? ICJ said only "a dispute had arisen between Iran and the United States."[29]

After ICJ found an existence of a *dispute* as being just quoted, it continued "on the other hand, the parties *differ* on the question whether *the dispute* between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute as to" the interpretation or application of the 1955 Treaty. The *difference* between the parties is plainly another thing than

the *dispute* found by the Court in that quotation above. Unlike the Lockerbie case, ICJ did not automatically find *a dispute concerning the application* of the 1955 Treaty. In the Lockebie case ICJ included a dispute concerning the applicability of a particular treaty among "disputes concerning the interpretation or application of the treaty."[30] At least, in the Oil Platforms case, ICJ did not take this controversial position that might have led to enlargement of jurisdiction *ratione materiae* under a compromissory clause of that kind.[31]

How the Court should resolve the difference between the parties to the applicability of the 1955 Treaty closely relates to the former point raised by the Court itself, namely that the Court should ascertain whether the violation alleged falls within the provisions of the 1955 Treaty. However, with crucial lack of the determination of the dispute, and without the evaluation of its context, ICJ entered into the simple interpretation of the 1955 Treaty. As mentioned below, what ICJ actually did was to ascertain whether the Iranian claims came under the 1955 Treaty. In this sense, ICJ substituted the question of whether the violation alleged fell within the provisions of the 1955 Treaty for the issue of the interpretation, as such, of the provisions of the 1955 Treaty.

ICJ, first, determined that the objections raised by the US comprised two facets : one concerning the applicability of the 1955 Treaty in the event of the use of force, and the other relating to the scope of various articles of the treaty.[32] ICJ then examined the interpretative issues of the 1955 Treaty in this order.

The US consistently denied the applicability of the 1955 Treaty to this case. The US never intended to contest the interpretation as such of the relevant provisions of the 1955 Treaty. Nonetheless, after ICJ interpreted Article XX (1) (d) of the 1955 Treaty as providing for a possible defense that could be invoked at the merits stage, it was engaged throughout in the interpretation of the provisions.[33]

The applicability of a treaty to a particular dispute means that the particular context of a dispute comes under the provisions of the treaty. In the Oil Platforms case, the parties differed in the evaluation of the context of the US actions that had triggered this case before the Court. In the present case, unlike in others, such as, the Mavrommatis Palestine Concessions case and the Ambatielos case, the difference of the parties as to the evaluation of the context of the dispute involved elements that could not be covered by or absolved in the issues of the interpretation of the 1955 Treaty. Therefore, its applicability could not be decided solely by its interpretation. Unless identifying and determining the nature of the context, ICJ could not have decided the applicability to this particular case of the 1955 Treaty a

in a real sense.[34] It is certain that at the jurisdictional stage the Court is under limitation of not touching upon issues in the merits, and especially under limitation in fact-finding. However, ICJ argued little this limitation in the present case, and it only reserved the issue of Article XX (1) (d) to the merits stage.

The lack of the characterization of the context was concretely revealed in specific points made in the Judgement.

First, for instance, ICJ said：

> Any action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation.., by means of *the* use of force is as unlawful as would be a violation by administrative decision or by any other means (emphasis added).[35]

ICJ here mentioned *the* use of force. If this meant *the use of force* in the pertinent context of this conflict, the Court must have determined it, whether it was really the means to deprive the oil platforms of their commercial function or it was a counter attack against the previous hostile actions, for instance, in that actual context. Contrary to this, as shown in this citation, ICJ just discussed *a use of force* in an *abstract* sense.

Second, in the examination of Article X (1), of the 1955 Treaty, ICJ decided that the lawfulness of the destruction of the oil platforms by the US could be evaluated according to this article.[36] This conclusion was given under a premise that the oil platforms concerned fulfilled a function of depositing and transporting oil for commercial purpose.

The parties, however, were opposed as to whether the oil platforms contributed to the commerce and trade. While, Iran contended such nature of the function of the oil platforms as contributing to the commerce and trade, the US asserted that they were military objectives. According to the US, Iranian helicopters that attacked merchant shipping had been launched from the oil platforms and small high-speed patrol boats had been deployed from the oil platforms to attack shipping and lay naval mines.[37] The characterization of the function of the oil platforms had a heavy impact upon the evaluation of the context that ICJ omitted in this case. The finding of the function of the oil platforms was closely related to the characterization of the US attacks, too. By avoiding these essential points, ICJ decided that the lawfulness of the use of force by the US *could be evaluated* pursuant to Article X (1). The *evaluation* here could not mean any more than that according to a possible interpretation a use of force in general came under the ambit of Article X (1).[38]

In addition, ICJ, on the one hand, approved the position contended by one side of

the parties to the dispute concerning the characterization of the function of the oil platforms that constituted an important part of the pertinent context of the dispute. As Judge Oda pointed to, ICJ decided that not *the dispute* but *the Iranian claims* fell under the 1955 Treaty.[39] The Court interpreted, not deciding its applicability, the provisions of the 1955 Treaty for that purpose.[40]

On the other hand, ICJ enlarged the ambit of the terms, such as "commerce" and "freedom of commerce", in the 1955 Treaty.[41] In this manner, finally, ICJ could conclude that it was empowered to entertain the case by the jurisdictional clause of the 1955 Treaty.[42]

(2) Relation and Distinction between a Governing Law over a Dispute and an Applicable Law to a Dispute

In the Nicaragua case, the intention contained in the so-called Vandenberg reservation raised an issue of relation between applicable rules to and governing rules over the case, and so it had an implication to an issue of determination of a dispute.

The Vandenberg reservation itself had been maldrafted and caused questions of its interpretation.[43] ICJ decided the issue of the Vandenberg reservation at the merits stage. In the Court's view the multilateral treaty reservation could not mean that it would exclude the application of any rule of customary international law.[44] The conclusion dose not differ whether the customary rules may, in content, be the same as or differ from that of the treaty rules invocation of which causes the reservation to become effective. According to ICJ, "on a number of points, the areas governed by the two sources of law do not overlap and the substantive rules in which they are framed are not identical in content."[45]

ICJ, at the jurisdictional stage, explained the applicability of the customary rules irrespective of the effect of the Vandenberg reservation. In the Court's view, first, customary rules, although they had been enshrined or embodied in the text of treaties, maintained their own independent existence and applicability, and, second, the claims of the parties to the present dispute were not confined to violation of the multilateral treaty provisions.[46] These reasons seem to be convincing as such. If the dispute is defined as containing a subject or a point under customary rules at which the parties are divided, and if the customary rules have been established their existence, those rules may become not only applicable to this case but also the governing rules over this dispute.

However, the Court's stance raised certain criticism. It points out that ICJ, at the merits stage, concentrated upon the issues of relation between two sources of

international law and of applicability of the customary rules only from an abstract perspective, and, therefore, that it neither identified nor determined the dispute itself under the customary rules.[47)]

As the criticism suggests, ICJ did not treat the issue of the Vandenberg reservation as an issue of the governing law over the dispute before the Court. This holds true of the US, too.

The US asserted that treaty principles and rules had subsumed customary rules, and that neither autonomous existence nor applicability of customary rules remained.[48)] ICJ denied this contention of the US. According to the Court, as to the coverage of the rules in the two sources, the UN Charter no means covered the whole area of the regulation of the use of force, and it was necessary to refer to customary rules. And, thus, in the Court's view, treaty rules never had subsumed customary rules.[49)] In addition, ICJ confirmed a separate existence of a customary rule, even if two rules belonging to two sources of international law appeared identical in content. This is because a special implementation mechanism existing within a treaty regime and a particular system of termination or suspention of treaty rules under the law of the treaties make treaty rules distinctive in comparison with customary rules.[50)]

However, compared to the Oil Platforms case, in the Nicaragua case, the applicability itself of the customary rules was not the critical point. Both parties would not deny that this case concerned mainly the issue of the use of force and the self-defense. Judging from this nature of the context of the dispute, the applicability of the customary rules, if established, on the use of force and the self-defense would be agreed in that the US actions concerned fell under the purview of those rules. What, then, ICJ could be asked was to decide whether the customary rules were the governing rules over the dispute, considering the facts, allegations of the both parties and legal grounds for their claims within the pertinent context of this dispute.[51)] Only if there was a real conflict with respect to particular rights and obligations under the customary rules, these rules had the status as the governing rules over this dispute.[52)] Nicaragua asserted that there was a distinct cause of action based upon customary rules.[53)] The point was whether this assertion was well founded.[54)]

In the SBT case, too, it was argued whether CCSBT had subsumed or eclipsed UNCLOS. As being touched upon later, the relation between the two treaties concerned should have been dealt with from a viewpoint of the governing law over the dispute considering the very cause of action. AT, however, treated that issue rather from the viewpoints of the coverage of those treaties or applicability of

UNCLOS.

From the same basic stance of the criticism against ICJ that was referred to above, one question, which is more than academic, is still pointed out with regard to the situation where customary rules are the same as conventional rules in content. If it could happen that one dispute arose under both a treaty rule and a customary rule that were identical in content, considering the intention of the Vandenberg reservation, could the customary rule be applied to the present case without defeating the object and purpose of the Vandenberg reservation?[55)]

As aforementioned, ICJ admitted in such a case to apply the customary rules. ICJ contended a distinctive nature of a treaty rule in its operation according to the law of treaties and a particular mechanism of implementation within a treaty regime. In the Court's view, such a distinctive feature of a treaty rule in comparison with a customary rule ensures autonomous existence and applicability of the customary rules to the present case.

This kind of interpretation of the Vandenberg reservation concerning a multilateral treaty, that the Court seems to adopt, lays emphasis on the multilateral *treaty*. In addition, the purpose of the Vandenberg reservation may be interpreted that the US does not agree to be bound by a treaty interpretation unless other affected parties to a treaty are similarly bound.[56)] In this case, ICJ is prohibited from interpreting a multilateral treaty, and from applying it to lend judgment without participation of the affected States. Even if ICJ applies customary rules, there would arise, at least logically, no question of treaty interpretation or application, irrespective of a practical effect of the Court's decision upon the interpretation of similar treaty rules.[57)] Therefore, jurisdiction of ICJ is not denied as far as it avoids interpreting and applying multilateral treaties.[58)]

The Vandenberg reservation excludes from jurisdiction of the Court "disputes arising under a multilateral treaty." ICJ understood the "disputes arising under a multilateral treaty" as those to which treaty rules were applied under the law of the treaties and as being put into operation within treaty regime. Contrary to the view of the Court, when a focus is placed on the governing rules over the dispute, it can be said that the Vandenberg reservation excludes from jurisdiction of ICJ cases over which substantive rules under multilateral treaties govern. According to this interpretation, ICJ is debarred to entertain a case by applying the customary rules that are the same in content as the treaty rules. Accordingly, it may not be only too artificial,[59)] but also defeat the purpose of the Vandenberg reservation for ICJ to exercise jurisdiction over a case by applying the customary rules that are the same

as multilateral treaty rules in content.[60] Such an interpretation of the Vandenberg reservation would decrease significance of the term "a multilateral treaty" contained in the phrase "disputes arising under a multilateral treaty." It can not completely explain why a presence of the affected parties to the treaty is necessary before the Court for it to have jurisdiction over a dispute, when it entertains the dispute according to the customary rules as being the same in content as the treaty rules.

In this regard, an interpretation of the Vandenberg reservation discards the element of multilateral *treaty* in the reservation. According to the view, the intention of the US was that it did not want to permit the Court to entertain *a multilateral, multiparty dispute* in the absence of a third State that would be affected by the Court's decision. The US purported to prevent ICJ from entertaining a multiparty case by artificially choosing only two parties to come before the Court. Here the key factor is not *a multilateral treaty* but *a multilateral, multiparty dispute*.[61] For that purpose, however, more appropriate drafting of it would have been adopted without unnecessarily placing weight on *a multilateral treaty*.[62]

(3) Tools to Enlarge Jurisdiction *Ratione Materiae*

① With respect for a dispute relating to applicability of a treaty in the Lockerbie case (Preliminary Objections), ICJ said：

> The Parties differ on the question whether the destruction of the Pan-Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal regime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1 of the Convention, falls to be decided by the Court.[63]

In the SBT case, A/NZ relying on the Lockerbie case emphasized that ICJ and other tribunals had applied a broad view of the term of dispute concerning the interpretation and application of the treaty in question. And, thus, A/NZ regarded the dispute concerning the legal regime applicable to Japan's conduct in the present case as a dispute which concerned the interpretation or application of UNCLOS, in accordance with Article 288 (1) of UNCLOS.[64]

This approach in the Lockerbie case could permit enlargement of jurisdiction *ratione materiae* of dispute settlement procedures upon which jurisdiction is conferred over a dispute concerning the interpretation or application of a particular treaty. Whenever one party alleges, and the other party denies that a treaty applies to an event, a dispute would be automatically established concerning the application of a

particular treaty. As a result, the latter party would be found itself being subject to the jurisdiction of the dispute settlement procedures of the treaty.[65] When the principle set forth by ICJ in the Oil Platforms case[66] is observed strictly in deciding jurisdiction *ratione materiae* under that kind of conpromissory clauses, an extravagant stretch of jurisdiction *ratione materiae* would be, to a certain degree, avoided.

In stark contrast to the Lockerbie case, AT in the SBT case clearly denied that approach taken by ICJ.[67] As aforesaid, AT stated that Applicant maintained, and the Respondent denied, that the dispute involved the interpretation and application of UNCLOS did not of itself constitute *a dispute over the interpretation of UNCLOS* over which AT had jurisdiction. AT only said "a dispute over the interpretation of UNCLOS" and deleted a dispute over the "application of UNCLOS." The intention of this deletion was not explained. However, AT did not admit that the difference between the Applicants and the Defendant quoted here automatically fell under the dispute over the application of UNCLOS. AT followed the Oil Platforms case in observing the principle as to whether AT had jurisdiction *ratione materiae* under compromissory clause of UNCLOS. AT, like the Fisheries Jurisdiction case, declared its power to determine a dispute on an objective basis. AT avoided admitting automatically an existence of *a dispute concerning the applicability of UNCLOS,* that came under the jurisdiction *ratione materiae* of the dispute settlement procedures under UNCLOS, when the parties were divided with regard to that question. Instead, AT determined its own competence to determine and define the dispute as being a dispute concerning the legality of unilateral fishing in which the catch exceeded the TAC that had been previously agreed.

In the Nicaragua case and the Oil Platforms case, not explicitly but in some sense implicitly, ICJ took such an approach as widened the jurisdictional basis under the FCN Treaty and the 1955 Treaty. Those treaties contained almost the same clauses the relevant part of which provides "the present Treaty shall not preclude the application of measures of... (d) necessary to fulfill the obligation of a party for maintenance or restoration of international peace and security, or necessary to protect its essential security interests..." As ICJ confirmed in the Oil Platforms case, the Court interpreted in both cases this clause not as setting a limitation on the reach of regulation by the treaty, but as providing an exemption that, *at the merits stage*, the Defendant (in both cases it was the US) could take advantage of.[68] In this manner, ICJ excluded the possibility for the Defendant to contest, at the jurisdictional stage, the applicability of the FCN treaty to the measures that it regarded as coming under the provision quoted.[69]

At the merits stage of the Nicaragua case, ICJ found several US actions as breaches of specific provisions of the FCN Treaty, by denying their justification by the US in accordance with Article XXI (1) (d)[70]. ICJ affirmed its own competence to determine whether the alleged measures came under Article XXI (1) (d). Accordingly, a State Party including such a provision as Article XXI (1) (d) would still be exposed to a risk that the Court will make a different decision from the State's interpretation that a measure be within or not the ambit of military and security matters.[71]

② In the Nicaragua case, Nicaragua invoked as a distinct basis of jurisdiction the FCN Treaty. ICJ held that the treaty provided a separate and independent basis for jurisdiction. This finding by the Court raised harsh criticism.

Nicaragua alleged two categories of breaches of the FCN treaty by US conduct：breaches of the obligation not to defeat the object and purpose of the treaty and breaches of specific obligations of the treaty. The latter has been mentioned previously and the following is an examination in relation to the former.

Regarding the first category of breach, ICJ recognized such an obligation not to defeat the object and purpose of a treaty not as being derived from the treaty itself but as being implicit in the principle of *pacta sunt servenda*.[72] Therefore, the Nicaraguan allegation of US breach of this obligation does not fall within the heading of breaches of the provision of the FCN Treaty. Its compromissory clause does not confer on the Court jurisdiction to entertain such allegation. In the present case, ICJ was empowered to entertain this allegation in accordance with Article 36 (2) of the ICJ Statute.[73] However, ICJ implicitly admitted that the compromissory clause covered disputes relating to breaches of an obligation not to deprive the FCN Treaty of its object and purpose, in discussing an "*implied*" obligation in a treaty. In the Court's view：

> A State is not bound to continue particular trade relations longer than it sees fit to do so, in the absence of a treaty commitment or other specific lagal obligation；but where there exists such a commitment, or of the kind *implied* in a treaty of friendship and commerce, such an abrupt act of termination of commercial intercourse as the general trade embargo. . . will normally constitute a violation of the obligation not to defeat the object and purpose of the treaty[74] (emphasis added).

As far as the obligation not to defeat the object and purpose is implied in the FCN Treaty, disputes relating to a violation of this obligation may fall under the reach of its jurisdictional clause. A party to a FCN treaty might surprisingly find itself

under the Court's jurisdiction, if its conducts connotes an *unfriendly* nature.[75] This enlargement of subject-matter and reach of a compromissory clause in a FCN Treaty would contradict to the US assumption that such jurisdiction will be confined to the explicit terms of the FCN Treaty.[76]

In the SBT case, the Applicants alleged that Japan defeated the object and purpose of CCSBT, and that this conduct of Japan could be legally assessed by the underlying obligations in UNCLOS. The Applicants contended that jurisdiction *ratione materiae* of AT under UNCLOS covered an act that defeated the object and purpose of a *different treaty*. This controversial enlargement of the jurisdiction *ratione materiae* will be examined later, with comparisons to the Nicaragua case.

(4) Lack of Relevance of an Argument for *Parallelism* of Dispute Settlement Procedures in the Electricity Company of Sofia and Bulgaria Case

The Applicants in the SBT case invoked the Electricity Company of Sofia and Bulgaria case (Preliminary Objections)[77] as a precedent for parallel or accumulative effect of plural compromissory clauses.[78] However, the arguments in that case for accumulative effect of two compromissory clauses do not have relevance to the SBT case.

In the case of the Permanent Court of International Justice (PCIJ) concerned, two instruments were alleged as the basis of jurisdiction ; the Declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of PCIJ in accordance with Article 36 (2) of the PCIJ Statute, on the one hand, and the Treaty of Conciliation, Arbitration and Judicial Settlement, on the other hand. The two instruments concerned in the Sofia and Bulgaria case did not contain substantive provisions differently from UNCLOS and CCSBT.

With regard to jurisdiction *ratione materiae*, both instruments established by using general concepts broad jurisdiction of the Court over legal disputes.[79] The Majority Opinion of the Court admitted "parallel application" of two compromissory instruments, and determined whether it had jurisdiction in accordance with each of them.[80] In Separate and Dissenting Opinions, parallel application of compromissory clauses was denied and one of which must be chosen to be applied.[81]

In a case where the same dispute or the perfectly same and individual subject of the dispute falls under the two compromissory clauses, parallelism of dispute settlement procedures would be questioned. However, in the SBT case, the critical issue was the determination of the dispute and its subject, and the determination of whether the dispute was concurrently of UNCLOS and CCSBT. This issue closely

related to the relation between the substantive provisions of CCSBT and UNCLOS. In this regard, due to the fundamental difference of the situation, the argument for the parallelism of compromissory clauses in the case of PCIJ is not of any relevance to the SBT case.[82)]

(5) A Certain Tendency Found in the Precedents

In the precedents that have some relevancy to the SBT case, on the one hand, a certain tendency was proved that the compromissory clauses concerned were flexibly interpreted so as to empower the Court to entertain the cases. With respect to this, a serious fear has been raised that too ambitious expansion by the Court of reach of jurisdictional and related clauses would cause hesitation in States in providing a compromisonary clause in a particular treaty. This fear could not be overemphasized, in light of the SBT case in which an issue of jurisdiction *ratione materiae* was critical, and where the two compromissory clauses under UNCLOS and CCSBT were invoked by each side of the parties.

On the other hand, as in the Fisheries Jurisdiction case, ICJ has refined key concepts or standards in order to determine a dispute, such as, an objective basis or the pertinent context of a dispute. In addition, separate or dissenting opinions in the cases dealt with here importantly suggest indispensable identification and evaluation of the context of a dispute, determination of a subject of a dispute and the issue of a governing law over a dispute.

Based upon the analysis of the precedents here, in the later sections it will be examined, in depth, how ITLOS and AT determined the dispute on an objective basis considering the context of the dispute. Before that, it might be useful to review succinctly the relevant facts for determining the dispute.

Ⅳ The Fact of the SBT Case

The three States are all parties to UNCLOS, but it became binding for all the three States only in 1996. Before that, in 1993, the three parties to the SBT case, for the purpose of the conservation, management and optimum utilization of SBT, concluded the CCSBT that came into force in 1994. CCSBT adopts concrete measures for the conservation, management and optimum utilization of SBT. The Commission for the Conservation of SBT (the Commission) established under CCSBT annually determines a Total Allowable Catch (TAC) and its allocation among the three parties.[83)] Decisions of the Commission shall be taken by a unanimous vote, and the measures for the conservation, management and optimum utilization of SBT bind

the parties.[84] Compared to this, under UNCLOS, Article 64 provides for cooperation between coastal States and fishing States with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species. Under its Articles 116 to 119, States have obligations of cooperation and obligations for conservation and management of living resources on the high seas.

In 1994, the Commission determined the same TAC and its national allocations as had been set by the three States since 1989. With regard to the scientific assessment, Japan, on the one hand, and A/NZ, on the other hand, were sharply divided. The former insisted on an increase of the TAC because SBT stock was thought to be on a recovery trend, and the latter did not recognize that trend. Due to this difference of opinions, until 1997, the Commission could not but maintain unchangingly the TAC and its national allocations that had been set in 1994. In 1997, the Commission finally became unable to set any TAC for the fishing season of 1998. Since then, the three parties voluntarily observed the same TAC and its national allocations.

Faced with this deadlock, Japan proposed a joint Experimental Fishing Program (EFP) with a view to reducing the scientific uncertainty about the recovery of SBT stock. A/NZ also admitted the necessity of EFP, and in 1996, the Commission adopted a set of "Objectives and Principles for the Design and Implementation of an Experimental Fishing Program". However, no agreements were reached on the size of the catch under the EFP and its modalities. In this situation, in the summer of 1998, Japan commenced a pilot EFP. In addition to the national allotment for commercial SBT fishing, the catch under this EFP in 1998 was estimated at 1,464 tons.

A/NZ vigorously protested against the Japan's unilateral implementation of the EFP in their Diplomatic Notes of August 31, 1998. They asserted that Japan's conduct was in breach of obligations under CCSBT, UNCLOS and customary international rules, particularly the precautionary principle. In accordance with Article 16 (1) of CCSBT, consultations and negotiations were intensively held among the three States. Japan requested A/NZ to specify Japan's conduct that they regarded as breaches of obligations under CCSBT. Japan also stressed that the consultations and negotiations under Article 16 (1) of CCSBT could be applied only to disputes concerning CCSBT and that they did not hold any relevance to other international agreements or rules. In response, A/NZ clarified their position that Japan's unilateral implementation of an EFP was at variance with Article 3 and other articles of CCSBT that provided for obligations for cooperation and the unanimous rule for the

decision of the Commission. Further, they denied the independent treatment of CCSBT from other international obligations, especially those under UNCLOS, considering that the preamble of CCSBT referred to UNCLOS. A/NZ pointed at the possibility that the three parties would discuss UNCLOS obligations within the consultations and negotiations under Article 16 (1) of CCSBT.

Despite the efforts of the three States, the negotiations resulted in failure. In 1999, although there was significant progress toward an agreement on the size of the catch for an EFP, there still remained disagreements concerning its design and analysis. In June of the same year, Japan unilaterally commenced a three-year EFP. With harsh protest A/NZ informed Japan that this resumption of the EFP by Japan was regarded as unilateral termination of negotiations on its side. They further pointed out the possibility of unilateral submission of this dispute to the compulsory dispute settlement procedures under UNCLOS Part XV Section II, since it was a dispute under UNCLOS on which negotiations among parties were already exhausted. In response, Japan clearly denied its intention to terminate negotiations and stressed that this was a dispute of CCSBT. Japan alternatively suggested mediation under Article 16 (1) of CCSBT. A/NZ responded that the acceptance of A/NZ of this offer should be on the condition that Japan should immediately cease its execution of the EFP. Japan rejected this cessation indicating that the issue of an EFP should be the very subject matter to be discussed in the future mediation. Japan reiterated that this dispute was one of CCSBT and, therefore, as a legal means of dispute settlement, arbitration under Article 16 (2) of CCSBT must be employed. After rejecting this proposal by Japan, A/NZ each proceeded to submit the dispute to the arbitral tribunal under Annex Ⅶ of UNCLOS.

V The Order of ITLOS of August 27, 1999

① The main requests of the Applicants to AT were to adjudge and declare Japan's violation of the obligations under Articles 64 and 116 to 119 of UNCLOS resulting from the various Japanese conducts.[85] The alleged violations included failure to cooperate with a view to conservation and management of SBT and failure to adopt necessary conservation measures for its nationals on the high seas. The Applicants complained that by carrying out the EFP in 1998 and 1999 Japan had caught and would catch SBT over the level of the national allocation that had been previously agreed within the Commission. They further asserted Japan's failure of having regard to the requirements of the precautionary principle.[86]

The provisional measures requested by the Applicants were as follows：

i that Japan immediately cease unilateral experimental fishing for SBT ;

ii that Japan restrict its catch in any given fishing year to its national allocation as last agreed in the Commission, subject to the reduction if such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999 ;

iii that the parties act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute ; and

iv that the parties ensure that no action of any kind is taken which might aggravate, extend or render more difficult of solution the dispute submitted to the Annex Ⅶ AT ; and that the parties ensure that no action is taken which might prejudice their respective rights in respect of the carrying out of any decision on the merits that the Annex Ⅶ AT may render.[87)]

In Japan's Statement in Response it contended :

i that AT must have *prima facie* jurisdiction, and this means that the dispute must concern the interpretation or application of UNCLOS and not some other agreement ; and

ii that A/NZ must have attempted in good faith to reach a settlement in accordance with the provisions of UNCLOS Part XV, Section 1 and that they have not satisfied either condition.

As a counter-request for provisional measures in the event that AT determined that this matter was properly before it, Japan requested ITLOS to prescribe :

i that A/NZ urgently and in good faith recommence negotiations with Japan to reach a consensus on the outstanding issues between them, including a protocol for a continued EFP and the determination of a TAC and national allocations for the year 2000 ; and

ii that any remaining disagreements would be referred to the panel of independent scientists for their resolution, should the parties not reach a consensus within six months following the resumption of the negotiation.[88)]

② Since the present case was submitted to AT under Annex Ⅶ of UNCLOS, the Applicants requested the provisional measures in accordance with Article 290 (5) of UNCLOS. Article 290 (5) provides for as requisites for ITLOS to prescribe provisional measures ⅰ) *prima facie* jurisdiction of AT to entertain the merit ; and ⅱ) urgency. In addition, because Article 290 (5) provides that ITLOS may prescribe "in accordance with this Article", requirements contained in Article 290 (1) should also be satisfied for ITLOS to prescribe provisional measures. Article 290 (1) provides that provisional measures shall be considered "appropriate under

the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment.[89]"

Because "*prima facie* jurisdiction" is thus expressly laid down under UNCLOS, ITLOS, unlike ICJ, is exempted from being puzzled over the issue of whether or not *prima facie* jurisdiction for considering merits is requisite in order to prescribe provisional measures.[90] Instead, ITLOS bears a different burden of setting forth the threshold of *prima facie* jurisdiction.

In the SBT case, in particular, the issue of jurisdiction——jurisdiction *ratione materiae*——was critical, due to the conflict between the parties relating to the characterization of the dispute, namely, as to whether it was a dispute of UNCLOS or a dispute of CCSBT. Considering the fact that there has been built a significant accumulation of treaties on the law of the sea containing their own dispute settlement procedures, in general, to identify a dispute of UNCLOS, to find jurisdiction *ratione materiae* bears cardinal importance. There will be cases over which both procedures under UNCLOS and an individual treaty have possibility to hold jurisdiction *raione materiae*. Faced with such a situation, to identify or find precisely a dispute of UNCLOS is critical condition for not only the procedures under UNCLOS but also those under other agreements to function properly. It may be a case that a dispute consists of plural subjects and one of them should be decided by UNCLOS and the other by CCSBT. The dispute settlement procedures under UNCLOS have jurisdiction *ratione materiae* solely over the former subject. If it occurred that an individual subject of decision was a point to be decided by both UNCLOS and CCSBT, in that case only, the procedures under both UNCLOS and CCSBT could have jurisdiction *ratione materiae* concurrently over the subject.

In any event, in the SBT case, being different from the Sofia and Bulgaria case, two treaties concerned contain substantive rules and have their own dispute settlement procedures with each jurisdiction *ratione materiae*. And, thus, the determination of the dispute was of critical importance. The SBT case was the first case for ITLOS to decide an existence of a dispute concerning the interpretation or application of UNCLOS in that situation. Therefore, in the SBT case, ITLOS had been expected so much to set a certain standard even of *prima facie* jurisdiction *ratione materiae*, at the stage of prescribing provisional measures. What a definite principle did ITLOS formulate?

③ As examined briefly above, A/NZ defined the dispute as one of UNCLOS and of CCSBT. A/NZ alleged Japan's breach of the obligations in the relevant provisions of UNCLOS and asserted that they had invoked UNCLOS in the negotiation

since May 31 of 1998.[91] Japan contended that it was a scientific dispute over the assessment of SBT stock and the project of EFP, so that it was not a legal dispute over the general and *abstract* principles of cooperation under UNCLOS.[92] Japan further contended that even assuming *arguendo* it was a legal dispute, it was a dispute of CCBST and that even A/NZ had recognized it as one of CCBST during the consultation under Article 16 (1) of CCSBT until May 31 of 1999.[93]

ITLOS found the existence of a *legal* dispute between the parties, refusing Japan's contention that it was a scientific dispute.[94] The remaining, but critical issue was whether the dispute was a dispute of UNCLOS. Did the dispute arise from or concern UNCLOS? Were the parties positively opposed in each other's legal claim under UNCLOS? These are questions that are indispensable to examine in order to find the material jurisdiction of AT.

With respect to the existence of a legal *dispute,* by invoking the Mavrommatis Palestine Concessions case, and the South West Africa case (Preliminary Objections), ITLOS maintained that a dispute was a "disagreement on a point of law or fact, a conflict of legal view or interests," and that "it must be shown that the claim of one party is positively opposed by the other." Then, ITLOS only placed Japan's denial of its breach of the provisions of UNCLOS, in parallel with A/NZ's allegation of Japan's breach of them.[95] Japan insisted that this was a dispute of CCSBT, even though it constituted a legal dispute. Even if Japan contended, in a general context, that its EFP was not contrary to any international rules during intensive negotiations, it was doubtful whether a real dispute or positive opposition under UNCLOS between the claims of each party could be found. The parties differed in determining the dispute, and it was at least one of the core issues of this litigation. Considering this fact, such a finding of a dispute of UNCLOS is far less convincing.[96]

ITLOS continued that under Article 64 of UNCLOS, "read together with Articles 116 to 119,[97]" State Parties had the duty to cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of highly migratory species and that SBT was included in the list of highly migratory species in Annex I to UNCLOS.[98] ITLOS admitted that the provisions invoked by A/NZ appeared to afford a basis of *prima facie* jurisdiction of AT without specifying the provisions.[99] A/NZ invoked Article 288 (1) as the basis of jurisdiction of AT,[100] and also invoked Articles 64 and 116 to 119 in alleging Japan's breach of obligations under UNCLOS. Judging from the context it could be interpreted that ITLOS meant Articles 64 and 116 to 119 as the

provisions to afford a basis of *prima facie* jurisdiction of AT.

In the view of ITLOS, the conduct of the parties within the Commission and in their relation with non-parties to CCSBT was relevant to an evaluation of the extent to which the parties were in compliance with their obligations under UNCLOS.[101] ITLOS affirmed that both CCSBT and UNCLOS could be applied in regard to the conservation and management of SBT.[102] These statements of ITLOS can be understood as its finding that the acts of the parties to the present case are related to the obligations under UNCLOS. ITLOS seems to approve that UNCLOS is the governing rule over the present dispute.

However, in determining the governing rule over the dispute, what should be focused upon are not *the conducts of the parties in general*. It is the specific activity that has exactly triggered and given rise to this dispute. As examined in relation to the Fisheries Jurisdiction case, in order to determine a dispute and to identify the governing rules over a dispute, the pertinent context of a dispute cannot be disregarded.

In the Oil Platforms case, ICJ, with crucial lack of the evaluation of the context, treated the use of force in an abstract sense and equated it with a use of force. Similarly, even at the stage of provisional measures, and in order to find only *prima facie* jurisdiction, ITLOS might have identified and focused upon the specific activities placed in the particular context of the dispute. Thus far, ITLOS stopped short at repeating the general remarks in the A/NZ's allegation that Japan had failed to comply with obligations by unilaterally designing and undertaking an EFP. ITLOS did not identify by itself the particular context or the specific activities that had triggered the dispute. ITLOS did not identify the subject of the dispute, either.

In addition, when ITLOS mentioned the relation between the parties and non-parties to CCSBT, it should mean the coverage of UNCLOS over the relation that was beyond that of CCSBT. This coverage of UNCLOS might prove its applicability to the dispute. However, as observed in the Nicaragua case, this meaning of the applicability cannot not ensure that UNCLOS is the governing law over this dispute. ITLOS only suggested the logical possibility of the applicability of both CCSBT and UNCLOS in regard to the issues of the conservation and management of SBT as such. However, the critical point was whether the parties to this particular dispute had been really divided relating to the very rights and obligations under UNCLOS.

As for the relation between the dispute settlement procedures under CCSBT and UNCLOS, in the view of ITLOS explained in Paragraph 55 of the Order, the fact that *CCSBT applies between the parties* does not preclude recourse to the procedures in

Part XV, section 2 of UNCLOS.[103] The paragraphs 53 and 54 that preceded this statement of ITLOS reproduced the arguments of the parties whether the recourse to AT was excluded because CCSBT established a dispute settlement procedure.[104]

Japan argued this issue only alternatively. Japan consistently asserted that this dispute was one of CCSBT, and, therefore, it discussed Part XV, section 1 of UNCLOS only on the hypothesis that this dispute was a dispute of UNCLOS. A/NZ took a position that it was concurrently a dispute of CCBST and UNCLOS.

If the phrase in the Paragraph 55 of Order *CCSBT applies between the parties* meant application of dispute settlement clauses of CCSBT,[105] in that Paragraph readers of Order would be suddenly thrown into a world governed by a presupposition that the present dispute was a dispute of CCBST and a dispute of UNCLOS at the same time. Before this, ITLOS did not definitely determine the dispute as one both under UNCLOS and CCSBT concurrently. The view of ITLOS, "the fact that the Convention of 1993 applies between the parties does not preclude recourse to the procedures in Part XV, section 2, of the Convention on the Law of the Sea" is, however, incapable of being understood otherwise.

CCSBT and UNCLOS each sets forth jurisdiction *raitione materiae* for their own dispute settlement procedures. In order to recognize that the present dispute is a dispute concerning the interpretation or application of UNCLOS and, at the same time, a dispute concerning the interpretation or application of CCSBT, it is indispensable to conclude that a single dispute has this double nature or, otherwise, that the present dispute consists in a combination of two disputes, a dispute of UNCLOS and a dispute of CCSBT. In Paragraph 52, ITLOS found that the provisions of UNCLOS invoked by A/NZ appeared to afford a basis of jurisdiction of AT. This should mean that at least partly the present dispute was a dispute of UNCLOS. Then, in the statement in weighing Paragraph 55, was ITLOS forced to admit the double nature of a single dispute or existence of two disputes? ITLOS kept silent on this issue. Even it did not point to that issue.

Finally ITLOS found *prima facie* jurisdiction of AT over the dispute.[106] Despite leaving critical issues unresolved, in any event, ITLOS expressly determined this dispute as one concerning the interpretation or application of UNCLOS. At the stage of prescribing provisional measures, it cannot be expected that ITLOS should make a final judgment on the issue of jurisdiction by completely considering the relevant facts. However, Article 290 of UNCLOS expressly provides for *prima facie* jurisdiction as a requisite for prescribing provisional measures. Accordingly, ITLOS has a burden to set a threshold of *prima facie* jurisdiction. In the SBT case,

the core issue in order to decide jurisdiction of AT was the determination of the dispute. In this regard, it is doubtful whether ITLOS has exercised its power to determine the dispute and to set forth a standard for establishing *prima facie* jurisdiction.

④ The determination of the dispute by ITLOS revealed incoherence considering the rights recognized by ITLOS to be preserved by provisional measures. In accordance with Article 290 (1) provisional measures may be prescribed to preserve the respective rights of the parties or to prevent serious harm to the marine environment, pending the final decision.[107] The rights to be preserved must be the rights that will be the objects of the decision on the merits. As far as jurisdiction *ratione materiae* of AT is jurisdiction to entertain a dispute concerning the interpretation or application of UNCLOS, and as far as ITLOS has already found this jurisdiction of AT, the rights to be preserved by the provisional measures prescribed by ITLOS must be the rights grounded in UNCLOS. In this regard, however, ITLOS seems to presuppose rights the basis of which under both UNCLOS and even international law is doubtful.

A/NZ contended that further catches of SBT by Japan's unilateral implementation of an experimental fishing would cause immediate harm to their rights.[108] Among the rights that under Articles 64 and 116 to 119 of UNCLOS A/NZ alleged were the rights vis-à-vis Japan：

i that Japan conserve, and cooperate in conserving the SBT stock；

ii that having Japan not take unilateral measures detrimental to that stock；

iii that having regard to the accepted objective of the parties of ensuring the recovery of the SBT parental stocks by 2020, at least to the level it was in 1980, none of the parties take unilateral steps which threaten the achievement of that aim；and

iv that, having agreed in 1996 to Objectives and Principles for the Design and Implementation of an experimental fishing program, Japan not unilaterally conduct a program which does not meet those Objectives and Principles.[109]

ITLOS found that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the SBT stock, although ITLOS could not conclusively assess the scientific evidence by the parties.[110] Since in another paragraph, too, ITLOS confirmed the requirement of urgency to prescribe provisional measures,[111] it was understood that ITLOS regarded the requirement of urgency as being satisfied in the present case.

As stated before, ITLOS itself affirmed that the relevant provisions of UNCLOS

stipulated the obligation of cooperation. The corresponding right of A/NZ to the obligation of cooperation should be a right to require cooperation.[112] What does it mean that a right to require cooperation is in danger of being damaged irreparably, and that the circumstances call for urgent preservation of such a right? Although Japan's unilateral continuation of experimental fishing would cause harm to that right to require cooperation, A/NZ would never lose their right. A/NZ would continue to be the right holder. They could have opportunities to urge Japan to cooperate as many times as they wanted based upon their right to require cooperation.[113] Neither irreparable harm to the right to require cooperation nor urgent need to preserve it is logical.

In fact, ITLOS said, "the parties should under the circumstances act with prudence and caution to ensure that effective measures are taken to prevent serious harm to the stock of SBT."[114] Here ITLOS seems to replace the right to require cooperation with a right of the parties over SBT stock. It cannot be denied that when disappearance of an object of a right, for instance, life or chose, amounts to disappearance or extinction of a right itself, in order to preserve a right preserving its object is necessary.[115] Similarly, considering that the purpose of cooperation is conservation and optimum utilization of SBT, in some case, to protect SBT would be indispensable to maintain the significance of the right to require cooperation. It is also possible that ITLOS prescribed the provisional measures for the purpose of preventing serious harm to the marine environment, as ITLOS recognized that the conservation of the living resources of the sea was an element in the protection and preservation of the marine environment.[116]

Whatever may be the purpose of the provisional measures, preserving the right over SBT stock, or preventing serious harm to the marine environment, the requisite of urgency must be satisfied in accordance with Article 290 (5). In this regard, Dissenting Opinion of Judge Vukas developed a totally persuasive argument based upon common sense. The hearing of this case took place in mid August 1999 and the Order was given on August 27. The Japan's experimental fishing had been declared to terminate no later than August 31 of 1999. It is difficult to find a practical meaning of the provisional measures other than that of symbolic value.[117]

According to some reviews of this Order, the precautionary principle could account for the prescription by ITLOS of such provisional measures.[118] In the phrase "prudence and caution", as cited above, the principle was implied, and separate opinions explicitly confirmed this.[119]

A/NZ asserted the reflection of the precautionary principle in Article 119.[120] The

possibility to interpret the rights of A/NZ according to the principle is not excluded. Nevertheless to form the basis of the provisional measures, such a right has yet been established in too fragile a way. As to the content of the right corresponding to the obligation of cooperation, it is quite controversial whether it may contain substantive entitlement over conservation and optimum utilization of fishery stocks rather than a procedural right to require cooperation.[121] When a right itself to be preserved is not well founded under international law, or when the content of the right as opposed to its basis has not yet been established, a provisional measure for the purpose of preserving such a right would raise serious criticism.[122] This is because material uncertainty still remains as to whether such a right will be found on the merits.

⑤ In the provisional measures prescribed by ITLOS, rights not under UNCLOS but under CCSBT were to be preserved.

ITLOS prescribed that the parties shall ensure that their annual catches would not exceed the last agreed level of national allocations, and that the parties shall refrain from conducting an EFP involving the taking of a catch of SBT, except with the agreement or unless the experimental catch was counted against its annual national allocation as last agreed.[123] Japan contended that such rights were only derived from CCSBT and not from UNCLOS as requiring the cessation of conducting an EFP and the observance of the last agreed national allocations.[124]

The parties agreed that a TAC and national allocations were set forth within the Commission established under CCSBT. Why do A/NZ hold those rights under Articles 64 and 116 to 119 under UNCLOS, and why may these rights be the objects of the decision of AT which has jurisdiction over a dispute concerning the interpretation or application of UNCLOS? ITLOS should have explained the reasons, if any, for that.[125]

VI The Arbitral Award on Jurisdiction and Admissibility of August 4, 2000

① AT found *in extenso* the background of this case and the positions of both parties.[126] The positions acknowledged by AT relating to the determination of this dispute are as follows. Japan, on the one hand, defined the dispute as one of CCSBT and it denied that the dispute involved the interpretation or application of UNCLOS. The first reason was that, considering the allegation of the Applicants that Japan should not conduct unilaterally an EFP without agreements, such an obligation as an obligation not to perform unilaterally an EFP could not have any ground under

UNCLOS. In addition, in Japan's view, an EFP had been argued between the parties within the framework of CCSBT. The second reason explained by Japan was that CCSBT exhausted or supplanted all the relevant obligations under UNCLOS.[127] A/NZ, on the other hand, maintained that this dispute involved the interpretation or application of UNCLOS. This was because it concerned Japan's breach of the obligations under Articles 64 and 116 to 119 of UNCLOS, and because UNCLOS provided the legal standards to assess such a situation as the Commission reached to an impasse.[128]

Relating to the issue of determination of the dispute, there were found another arguments made that were worth to be mentioned. As an objection to the admissibility of the request, Japan argued that this dispute was a scientific one. In addition it contended that the Applicants failed to identify a cause of action by providing only vague and elusive reference to the provisions of UNCLOS.[129] Against this objection, A/NZ responded that if all disputes concerning fishery had been only scientific, Article 297 (3) of UNCLOS would have held no meaning, and repeated its allegation that Japan breached the relevant provisions of UNCLOS.[130]

② AT identified the issues concerning the level of a TAC and Japan's unilateral performance of an EFP, and determined that at the core of this dispute was the difference of opinions as to whether SBT stock had in fact begun to recover and as to the means to reduce the scientific uncertainties.[131] AT clearly admitted that all the main elements of the dispute had been addressed within the Commission. After this determination, AT circumscribed the conflict between the parties in specifying that the confrontation had been raised in relation to the interpretation of CCSBT, especially Article 8 (3), and in relation to the power of the parties to CCSBT[132] in case in which the Commission was unable to decide. With regard to the alleged conflict between the parties under UNCLOS, AT repeated the Applicants'contention and allegation of Japan's breach of the relevant provisions of UNCLOS, and just stated that the Applicants found a certain tension between cooperation and unilateralism.[133]

③ AT rejected Japan's contention that this dispute was not one of UNCLOS, and concluded that this dispute, while centered in CCSBT, had arisen also under UNCLOS.[134] The reasons are as follows : first, it is commonplace for more than one treaty to bear upon a particular dispute ; second, CCSBT cannot be regarded as having fulfilled and eclipsed the obligations of UNCLOS ; and third, a dispute concerning the interpretation of CCSBT will not be completely alien to the interpretation and application of UNCLOS for the very reason that CCSBT was designed to implement broad principles set out in UNCLOS.

Both AT and Japan were unable to avoid a tendency to build arguments in a general and abstract way diverging from the particular point at issue in the present dispute. Japan contended that UNCLOS was an umbrella or framework convention requiring implementation agreements, and that the obligations of UNCLOS had been subsumed and eclipsed by CCSBT. The reason set forth by Japan was that, having agreed to CCSBT, an implementation agreement which Article 64 of UNCLOS assumed, and having established the Commission, the parties could implement any obligations under UNCLOS. The conclusion reached by AT, as being referred to above, was a response to this Japan's argument.[135] At the basis of this Japan's contention there seems to be a premise that the concrete facts and particular context of the present dispute were the very activities and confrontations between the parties within the framework of CCSBT.[136] Nevertheless, the tendency of putting a focus upon the relation, in general terms, between UNCLOS and CCSBT cannot be denied in the arguments raised by both Japan and AT.

In the long paragraph where AT concluded as to the determination of this dispute, AT almost built a theory on the relation of UNCLOS and CCSBT touching exhaustively upon points to be discussed.[137] What was expected of AT was, instead, to find and specify, at first, the specific points at which the parties were divided concerning the interpretation or application of UNCLOS, and then, to decide whether the relevant provisions of UNCLOS could be the governing rules over the very points identified.

As aforementioned in relation to the Nicaragua case, courts and tribunals are required to find the precise governing law over the dispute before them. To identify the governing law is a different thing from finding rules that are applicable to certain phenomena abstractly being separated from the context where that phenomena have taken place. Generally an issue of conservation and management of fishery resources may fall under the purview of the relevant provisions of UNCLOS. It is, however, another thing to determine whether in the present case the parties were opposed in their opinion as to the particular rights and obligations under UNCLOS.

AT compared the coverage of the particular provisions of UNCLOS invoked by A/NZ and those of CCSBT. AT concluded that the provisions of UNCLOS had its own content. However, the coverage itself is not important. The point was whether the parties were divided concerning particular rights and obligations under UNCLOS. Furthermore, the point was not whether *the claim* of the Applicants had independent ground only under UNCLOS and not under CCSBT. It was whether *the dispute* existed between the parties in their legal positions with respect to any point

under UNCLOS which was not covered by CCSBT. As AT itself affirmed, it was for AT to determine *on an objective basis* the dispute by not exclusively depending upon the claims by the Applicants.

AT definitely identified the core of this dispute and almost particularized the points at which parties were divided concerning the interpretation or application of CCSBT.[138] Compared to this, with respect to the core of the dispute of UNCLOS it only repeated, not demonstrating as its finding, the contentions of the Applicants.[139] The position of AT remains vague as to what are the core points of this dispute of UNCLOS and what particular rules *of UNCLOS* govern it.

AT defined the present dispute as a single one that formed concurrently a dispute of UNCLOS and of CCSBT.[140] This gives rise to some confusion. Does the present dispute constitute a combination of some subjects governed by UNCLOS and others governed by CCSBT? Or, stated otherwise, do the core points of the dispute that have been already identified by AT have as the governing rules both UNCLOS and CCSBT as well? And if this is true, in what sense? In this regard, AT only explained that this dispute, while centered in CCSBT, also implicated obligations under UNCLOS.[141]

In the view of AT, a dispute of CCSBT would not be "alien to the interpretation and application of UNCLOS for the very reason that CCSBT was designed to implement broad principles set out in UNCLOS." It is elusive what "alien" does mean. If AT meant that a dispute under a treaty which might have a role, formally or practically, to implement UNCLOS always became a dispute under UNCLOS, all the disputes under any such treaties on the law of the sea would fall under the reach of jurisdiction *ratione materiae* of dispute settlement procedures of UNCLOS. Such a consequence would contradict the intention of the State Parties to those treaties that prescribe their own dispute settlement procedures.[142] AT itself clearly determined that the core of this dispute were the level of the TAC and Japan's unilateral performance of an EFP, and AT also declared that the main elements of the dispute had been addressed within CCSBT. Accordingly, AT should have explained how these particular main elements of the dispute would constitute the subject of a dispute under UNCLOS. Or, it would be possible that this dispute is a single dispute concurrently under CCSBT and UNCLOS, because it consists of a subject concerning CCSBT and a subject concerning UNCLOS. If AT had taken this stance, it should have determined the subject concerning UNCLOS that was independent from a subject concerning CCSBT. In this regard, the issue of the fishing right under UNCLOS should be focused upon, which will be discussed in the next part of this

section.

IT may be questioned whether the issue of the fishing right actually formed a subject of the dispute, being separated from the issue of the legality of Japan's unilateral performance of an EFP under CCSBT. However, the issue must be the subject of the dispute, as examined in the Fisheries Jurisdiction case, within the particular context of the present dispute.

As mentioned above, AT did not even determine by itself with respect to UNCLOS the points at issue that really divided the parties. Accordingly, AT did not ascertain that the parties actually were opposed to each other on the basis of the particular rights and duties under UNCLOS. In other words, AT gave no sufficient reasons for that UNCLOS was the governing law over the present case.

④ In relation to whether UNCLOS sets forth the legal standards to regulate and govern the present case, the following points deserve attention.

When AT rejected the contention of Japan that this case was moot, AT stated that in addition to an issue of quality of an EFP, *perhaps* there were other elements of difference as well, such as the assertion of a right to fish beyond TAC limits that had been last agreed.[143] If such a difference constituted an element of the case, was the legal rule to regulate and govern that point UNCLOS? AT did not address this.

A/NZ asserted that Article 119 of UNCLOS legally assessed the issues of Japan's *unilateral and additional* fishing.[144] Further they contended that where the Commission was at an impasse, the underlying obligations of UNCLOS provided a standard by which Japan's act defeating the object and purpose could be evaluated.[145]

A/NZ asserted here the applicability of UNCLOS on the basis upon the Oil Platforms case. They contended that when some conducts in question, could be evaluated by a treaty, that treaty would be applicable and that the dispute concerning its violation alleged would be a dispute concerning the interpretation or application of the treaty.[146] As criticized before in examining the Oil Platforms case, if A/NZ meant that as far as some activities as such, irrespective of its pertinent context in which the dispute had arisen, could be assessed by a treaty that treaty would be the governing rule of the dispute, it would totally disregard the context of the dispute. As a result, the applicability of the treaty and the meaning of *a dispute concerning the interpretation or application of the treaty* would be inappropriately enlarged.

Japan replied that when the *additional* fishing meant fishing that exceeded the TAC previously agreed, this would be an issue treated within CCSBT, since the TAC had been set forth by the Commission under CCSBT. In Japan's view, in addition,

the legal complaint against the *unilateralism* could find its reason only in CCSBT, and not in UNCLOS. This was because, according to Japan, the Commission adopted the unanimous voting procedure, and because within the framework of CCSBT, the three parties had consulted over the issue of an EFP.[147] This difference between the parties remained unanswered by AT.

While AT did not deal with the question of admissibility, it observed that the provisions of UNCLOS, that brought the dispute within the substantive reach of UNCLOS, suggested that the dispute was not purely a scientific one.[148] Japan filed two objections against the admissibility of the request : first, this dispute was a scientific one, and second, the Applicants did not identify a cause of action as a result of using vague and elusive reference to the provisions of UNCLOS.[149] With respect to the second objection, AT mentioned only "its analysis of provisions of UNCLOS that brings the dispute within substantive reach of UNCLOS. . . ."

As relief sought, the Applicants included in it the observation by the parties of the previously agreed TAC and national allocations.[150] Japan contended that such relief could not be founded in UNCLOS.[151] This question also remained unanswered.

⑤ A/NZ asserted that where the Commission was at an impasse due to Japan's acts defeating the object and purpose of CCSBT, the underlying obligations of UNCLOS provided a standard by which the lawfulness of unilateral conduct could be evaluated. Especially in the Applications, A/NZ clearly maintained that Japan defeated the object and purpose of CCSBT and that Japan could be called to account for this failure through the mechanism that UNCLOS provided.[152] This is because, according to A/NZ, Japan in defeating the object and purpose of CCSBT simultaneously violated its obligations under UNCLOS.[153]

In the Nicaragua case, as examined before, Nicaragua invoked the jurisdictional clause of the FCN Treaty, alleging that US had defeated the object and purpose of the FCN Treaty. ICJ admitted the existence of such an obligation based not upon a treaty itself, but upon the principle of *pacta sunt servanda*. In addition, ICJ recognized an *implied obligation* not to defeat the object and purpose of the FCN Treaty. As a logical result of this, ICJ must have found jurisdiction *ratione materiae* according to the compromissory clause in the FCN Treaty in respect to the allegation of breach of such an obligation. ICJ did not clearly address this, since ICJ had also found a basis of jurisdiction in the declarations of the parties accepting the compulsory jurisdiction of the Court.

Compared to the Nicaragua case, in the SBT case, the Applicants made an allegation that Japan defeated the object and purpose of CCSBT in order to define

a dispute as one of UNCLOS, and in order to invoke compromissory clauses under UNCLOS. A/NZ would contend that Japan's breach of that obligation constituted a violation of an "underlying obligation" of UNCLOS. Whatever the relation between CCSBT and UNCLOS may be, and whatever the implication of an "underlying obligation" of UNCLOS may be, could a dispute concerning the interpretation or application of UNCLOS hold within it a dispute concerning a violation of the obligation of not to defeat the object and purpose of another independent treaty that has its own dispute settlement procedures? Could UNCLOS stipulate *an implied obligation* not to defeat the object and purpose of any treaties that, wholly or partly, and, formally or practically, may fulfill concrete implementation of UNCLOS?

AT did not take, at least expressly, such a wide interpretation of both substantive provisions and compromissory clauses of UNCLOS. As far as an impasse at which the Commission reached was concerned, AT did not convey upon such an impasse as automatic justification of a sort of shift from CCSBT to UNCLOS to be the regulatory instruments for the parties to both of CCSBT and UNCLOS.

In addition, AT suggested that "perhaps" differences between the parties would remain concerning a right to fish beyond TAC limits that were last agreed.[154] This difference might mean a point at which the parties, facing an impasse of the Commission under CCSBT, were divided. Nevertheless, as confirmed before, AT did not express that this issue should be decided according to UNCLOS.

⑥ AT characterized the present dispute as a single dispute both under CCSBT and UNCLOS. Nonetheless, lack of clarification cannot be denied regarding the points at which the parties conflicted actually based upon the rights and obligations under UNCLOS. This characterization of the dispute brought an important result. It enabled AT to admit that Part XV, section 1 of UNCLOS *and* Article 16 of CCSBT *simultaneously* apply to the present dispute.[155] And, thus, AT on the premise that Article 16 of CCSBT applied to *this dispute with a double nature* concluded that Article excluded "any further procedure" according to Article 281 (1) of UNCLOS.[156]

Ⅶ Concluding Remarks

Before the SBT case, there were relevant precedents in which whether the dispute fell under a treaty was a point at issue for the ICJ to determine jurisdiction under the jurisdictional clause prescribed in that treaty. In the SBT case, too, determination of the dispute as one under UNCLOS was crucial for AT to have jurisdiction to entertain the case.

In the precedents, first, many factors in consideration were interwoven such as

applicability of treaty and customary rules alleged, particular context in which a dispute had arisen, relation between context of a dispute and claims found in applications, identification and characterization of a context of a dispute and so on. The Court has yet in the middle way to firmly establish a method to determine a dispute on an objective basis and to decide a dispute according to the properly governing law over the dispute.

Second, in the precedents there has been found a certain tendency that the Court admits broad jurisdiction *ratione materiae* and that as a result it decides in favor of Applicants by applying various means as examined in the section III above. Since at the jurisdictional stage, the Court is under limitation especially in fact-finding, it cannot be denied that it may face a great difficulty to finally decide the jurisdiction *ratione materiae*.[157] However, one thing must be pointed out that postponing that issue to be decided on merits would function in favor of Applicants in a sense that they can proceed any way to the merits stage against an objection by Defendants. The Court, at least, make clear what it may, tentatively or finally, decide at the jurisdictional stage, and what it reserves to the merits stage for what particular reasons in the cases concerned.

Toward the tendency of broadening jurisdiction *ratione materiae,* an important criticism has been directed that such tendency would cause a serious hesitation in States to include a compromissory clause in a particular treaty to accept jurisdiction *raione materiae* of ICJ over a dispute concerning the interpretation or application of the treaty.[158]

This caution totally holds true for ITLOS and other procedures under UNCLOS. Especially, in the SBT case, the outstanding characteristics consisted in the following facts : there were two relevant treaties in question each of which not only contained substantive rules but also established dispute settlement procedures of its own, and the determination of the dispute in order for ITLOS or AT to find jurisdiction of AT unavoidably involved the issue of the relation between the substantive rules under those treaties. Such situation as in the SBT case will frequently occur because of the existence of voluminous law of the sea treaties that have established their own dispute settlement procedures for a dispute under those treaties. An inappropriate enlargement of jurisdiction *raione materiae* of the procedures under UNCLOS would defeat the premise of other law of the sea treaties. Considering the fact that under UNCLOS, in principle, compulsory dispute settlement procedures are provided, determination of an existence of a dispute under UNCLOS must be all the more with every caution and precision.

Compared to such a basic stance, both ITLOS and AT seem to take a different approach in the SBT case. ITLOS and AT defined the dispute as one of UNCLOS. AT clearly determined the double nature of the single dispute：a dispute of UNCLOS and a dispute of CCSBT. By doing this, AT could admit *a concurrent existence* of jurisdiction *ratione materiae* of the procedures both under UNCLOS and CCSBT. However, its meaning remains unclear.

There are several cases in which a dispute has a double nature. First, the dispute may consist of a particular subject of CCSBT and a particular subject under UNCLOS and, as a result, as to the subject of the dispute as a whole, that dispute has a double nature. When the submission of the parties includes plural points to be decided, it may happen one of them is a subject under CCSBT and the other one under UNCLOS. In that case, the dispute settlement procedures under UNCLOS have jurisdiction *ratione materiae* only over the latter subject. Thus, as to the individual points to be decided, an issue of a "concurrent" or "parallel" existence of dispute settlement will not occur.

Second, a particular subject of decision might be a point to be decided concurrently according to CCBST and UNCLOS. In that case only, the *parallel* or *concurrent* existence of jurisdiction *ratione materae* should be really questioned. Whether not a whole subject of a dispute but a particular subject of decision can have a double nature heavily depends on the interpretation of the relation between the substantive provisions under the two treaties. In the SBT case where the relation between the obligations under CCSBT and UNCLOS must have been substantially examined. As examined in this Paper, ITLOS left this issue unresolved, and AT, although making much effort in the comparison of the coverages of the two treaties, only equivocally or elusively dealt with it. For an individual subject of decision to have that double nature, it is far less sufficient argument that CCSBT has been concluded with a view to implement obligations of the conservation and management that UNCLOS abstractly provides. If such an argument was endorsed, it would lead to an unconvincing conclusion：only by the fact that one treaty is a kind of an umbrella or framework treaty setting forth general principles and the other prescribes concrete measures to implement the principles, it can be said that a dispute as to the concrete measures necessarily involves a subject of the interpretation or application of the umbrella or framework treaty.

There have been developed, especially in the filed of the law of the sea, voluminous treaties that have certain relations to each other. The nature and degree of those relations are various and depend on an individual case. In order to ensure the

proper function to be fulfilled by the dispute settlement procedures under UNCLOS and those under other treaties, it is critical to define the relation of jurisdiction *ratione materiae* of the procedures under each treaty. For that purpose, an examination in depth is also required of the relation of the substantive rules of the relevant treaties.

Notes

1) Southern Bluefin Tuna Cases (New Zealand v. Japan ; Australia v. Japan), Request for Provisional Measures, *Order Rendered by International Tribunal for the Law of the Sea, August 27, 1999* (*Order*). The text downloaded from the web site is reproduced and reformatted in 38 *International Legal Materials,* 1999, pp. 1624 ff. The citation in this Paper is according to the original text and the text appearing on the web site. As a general overview of this dispute, Kanehara, N., "Minamimaguro Jiken ——Jijitsu to keii," (Southern Bluefin Tuna case——Facts and History——), 100 *Kokusaiho Gaiko Zasshi* (*The Journal of International Law and Diplomacy*), pp. 1 ff. As a review of *Order,* Kwiatkowska, B.," Case Report : Southern Bluefin Tuna (New Zealand v. Japan ; Australia v. Japan), 94 *The American Journal of International Law,* 2000, pp. 150 ff.

2) Southern Bluefin Tuna Case (Australia and New Zealand v. Japan), *Award on Jurisdiction and Admissibility, Rendered by the Arbitral Tribunal constituted under Annex* Ⅶ *of the United Nations Convention on the Law of the Sea, August 4, 2000* (*Award*). The text downloaded from the web site is reproduced and reformatted in 39 *International Legal Materials,* 2000, pp. 1359 ff. The citation in this Paper is according to the original text and the text appearing on the web site. As case reviews, Kwiatkowska, B., "Case Report : Southern Bluefin Tuna (Australia and New Zealand v. Japan)," 95 *The American Journal of International Law,* 2001, pp. 162 ff ; Sugihara, T., "Minamimaguro Chuusaisaibanjiken no Senketutekikouben-Shomentetsuzuki ni Okeru Shucho no Bunseki——" (The Southern Bluefin Tuna Arbitration-Preliminary Objections in Written Proceedings——), 100 *Kokusaiho Gaiko Zasshi* (*The Journal of International Law and Diplomacy*), 2001, pp. 45 ff ; Ando, N., "Minamimaguro Chuusaisaibanjiken no Senketsutekikouben-Kotobenrontetsuzuki ni Okeru Shucho no Bunseki" (The Southern Bluefin Tuna Arbitration——Preliminary Objections in Oral Proceedings——), ibid., pp. 79 ff ; Kawano, M., "Minamimagurojiken Chuusaihanketsu no Igi——Hukusu no Hunsoukaiketsutetuzuki Kyogo ni Tomonau Mondaiten——" (Arbitral Award in the Southern Bluefin Tuna Arbitration——The Experience of the Conflict of Procedures for one Dispute——), ibid., pp. 111 ff ; Kuribayashi, T., "Minamimagurojiken Chuusaihanketsu no Hyoka-Hunsokaiketsushisutemu no Tayoka no Naka de——" (An Evaluation of the Award of the Southern Bluefin Tuna Arbitration——In a Prolifilation of the International

System of Dispute Settlement——), ibid., pp. 146 ff ; Yamada, Ch.," Minamimagurojiken——Chuusaihanketsu ni Yosete——(On Arbitral Award), ibid., pp. 175 ff.

3) In this Paper, *determination of a dispute* means to mainly decide on what legal rights and obligations exactly the parties to the dispute in question are opposed to each other. In the SBT case, the parties were sharply divided as to whether or not the dispute was one of UNCLOS. To determine the dispute as one of UNCLOS, for instance, means that the parties' legal positions conflict in relation to the rights and obligations under UNCLOS.

4) *Reply on Jurisdiction by Australia and New Zealand* (*Reply*), pp. 28-29, paras 30-31 ; Oxman, B.H., "Complementary Agreements and Compulsory Jurisdiction," 95 *The American Journal of International Law,* 2001, pp. 278-280, 285-287.

5) Annex 47 to *Memorial of Jurisdiction of Government of Japan* (*Memorial*).

6) At the hearing before AT, Japan emphasized this point, *Transcripts,* May 10, 2000, Morning Session, Remarks by Sir Elihu Lauterpacht.

7) *Award,* p. 104, para 63. On the other hand, AT took note of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. Its provisions relating to dispute settlement procedures specify that the provisions relating to the dispute settlement set out in Part XV of UNCLOS apply *mutatis mutandis* to any dispute between State Parties to the Agreement concerning its interpretation or application, ibid., pp. 109-110, para 71.

8) Since in the Hostage case ICJ introduced the term self-contained regime, neither its meaning nor its legal effect has been unequivocally defined, Case Concerning United States Diplomatic and Consular Staff in Tehran, *ICJ Reports 1980,* p. 40, para 86. In this Paper, here, the concept is used to mean that a treaty regime containing its own dispute settlement mechanism excludes application of other dispute settlement procedures, including those under a general international law. *See,* for example, Simma, B., "Self-Contained Regimes," XVI *Netherlands Yearbook of International Law,* 1985, pp. 110-136.

9) Similarly in the Lockerbie case, while the US did not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention, the US contested, according to its own determination of the dispute, applicability of that Convention to the case. In the view of the US, the dispute was not a "bilateral differences" but one of a "threat to international peace and security resulting from State-sponsored terrorism." Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Preliminary Objections, *ICJ Reports* 1998, para 23. (When only the text downloaded from the web site of ICJ is available at the time of pubilication of this paper, the numbers of the relevant paragraphs only are indicated.)

10) As Jennings suggested, identification or determination of a dispute is cooperative

work among both parties to the dispute and the Court, by evolving arguments and considering the relevant factors in the procedures before the Court, Jennings, Sir R., "Reflections on the Term 'Dispute'," Macdonald, R. ST. J., *Essays In Honour of Wang Tieya,* 1994, Dordrecht/Boston/London, pp. 403-405.

11) AT quoted the Judgment of ICJ in the Case Concerning Oil Platforms. In this case, ICJ said:

> In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty... pleaded...do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain.,. (Case Concerning Oil Platforms, Preliminary Objections, *ICJ Reports 1996,* pp. 809-810, para 16.)

12) Here AT again quoted the Judgment of ICJ in the Fisheries Jurisdiction Case. In this case, ICJ said:

> It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the Parties, by examining the position of both Parties... The Court will itself determine the real dispute that has been submitted to it... It will base itself not only on the Application and final submissions, but on diplomatic exchanges, public statements and other pertinent evidence... (Fisheries Jurisdiction Case, Jurisdiction of the Court, *ICJ Reports 1998,* paras 30-31.)

13) Ibid., para 23. For a detailed description of the history of this dispute, see, Davis, P.G.G. and Redgwell, R., "The International Legal Regulation of Straddling Fish Stocks," 67 *The British Year Book of International Law,* 1996, pp. 202-215; Bretton, Ph., "L'affaire de la Compétence en matière de pêcheries (Espagne contre Canada): L'arrêt de la CIJ du 4 décembre 1998," III Annuaire du droit de la mer, pp. 189-206.

14) *Application Instituting Proceedings,* p. 13.

15) Op cit., supra n. 12, para 23.

16) The relevant part of the text is reproduced in the Judgment, op cit., supra n. 12, para 14.

17) Ibid., para 30.

18) Ibid., para 35.

19) Ibid., para 34.

20) As to the exact sea area where the *Estai* incident took place, ICJ identified it on the high seas at para 35 when defining the dispute, although ICJ identified it as the NAFO Regulatory Area at para 19. Judge Oda addressed this issue in his dissent, Dissenting Opinion of Judge Oda, *ICJ Reports 1998,* paras 5-7.

21) Judge Vereshchetin invoking the North Sea Continental Shelf Case, asserted the possibility for an abstract issue of legal entitlement or legal ground of a particular act to form a subject-matter of a dispute, Dissenting Opinion of Judge Vereshchetin, *ICJ Reports 1998,* para 6. However, in the North Sea Continental Shelf case, that charac-

teristic subject-matter of the dispute had been set forth by the parties themselves, while in the present case, the characterization or formulation of the disputes was the very point at which the Parties were divided.

22) Ibid., para 8.

23) Spain asserted that Canadian enforcement measures including use of force formed an independent cause of action based upon Article 2 (4) of the United Nations Charter. ICJ did not accept this allegation by the reason that these enforcement measures had been among the measures for the conservation and management of fishery stocks, op cit., supra n. 12, paras 61, 78, 84.

24) By doing this, ICJ could have responded enough to such criticism as being raised by Judge Vereshchetin who asserted that the Court could not without well-founded reasons redefine the subject of dispute in disregard of the terms of the Application and of other submissions by the Applicant, *op cit.*, supra n. 21, para 4.

25) Op cit., supra n. 11, pp. 805, 808-809, paras 1, 12-13.

26) Ibid., pp. 810-811, para 18.

27) Ibid., p. 810, para 16

28) Dissenting Opinion of Judge Oda, *ICJ Reports 1996,* pp. 890-891, para 3.

29) Op cit., supra n. 11, pp. 809-810, para 16.

30) Op cit., supra n. 9, paras 24, 28.

31) As an implication or a practical effect, the Judgement of the Oil Platforms case revealed the same tendency as the Lockerbie case. This question will be dealt with later. In the SBT case, AT denied that a dispute concerning applicability of UNCLOS, of itself, constituted a dispute over the interpretation of UNCLOS, and thus, it took a different approach from that of the Lockerbie case. This point, too, will be examined later.

32) Op cit., supra n. 11, p. 810, para 17.

33) Article XX (1) (d) will be discussed in III (3). ICJ plainly stated that the parties differed to the interpretation of the relevant provisions of the 1955 Treaty, ibid., p. 812, para 22.

34) Judge Higgins defined that the difference between the parties as to the nature or function of the oil platforms concerned and characterization of the US attakcs as a difference of the *facts*, Separate Opinion of Judgen Higgins, *ICJ Reports, 1996*, p. 858, para 38. In this paper, the expression evaluation of the context is used. The evaluation at least includes the following matters to be considered or to be determined：first, the function of the oil platforms concerned；second, the US attacks against the oil platforms may individually constitute the fact as such or it must be properly situated in the back ground of a series of Iranian attacks against the US and other States' merchant vessels. The parties were not opposed in regard to the incident triggering the dispute that the US had attacked the Iranian oil platforms in question, that is to say, they did not differ as to *the context* of the dispute as such. They differed as to *the evaluation of the context*；whether the oil platforms had been used for commercial

purpose and whether the US attacks upon them were defensive counter actions against the series of Iranian attacks upon the US and the third States' vessels on the Persian Gulf. Compared to such situation, in the Mavrommatis Palestne Concessions case, the question as to whether the dispute related to the interpretation or the application of the provisions of the Mandate could be resolved by determining the interpretative issues of the terms, such as, "public control" and "international obligations accepted by the Mandatory" in the Mandate, Case of The Mavrommatis Palestine Concessions, *PCIJ Series A*, No. 2, pp. 15–23. Similarly, in the Ambatielos case by interpreting the relevant provisions of the 1886 Anglo-Greek Commerce Treaty ICJ decided the obligation of UK to cooperate with Greece in constituting a Commission of Arbitration, Ambatielos Case, Merits, *ICJ Reposts 1953*, pp. 19–22.

35) Ibid., pp. 812–813, para 21.

36) Op cit., supra n. 11, p. 820, para 51.

37) Dissenting Opinion of Judge Schwebel, *ICJ Reports 1996,* p. 875.

38) In the SBT case, the Applicants invoked this decision of ICJ in the Oil Platforms case as supporting their position. They contended that "fall within the provisions of" a treaty meant that a treaty provided a standard of evaluation on the lawfulness of the actions concerned, *Reply,* pp. 20–22, 25, paras 47, 52–53.

39) Op cit., 28, supra n. 11, pp. 899–900, para 24.

40) Judge Higgins stated that the only way in which the Court could determine whether the claims of Iran were sufficiently plausible based upon the 1955 Treaty, was to accept *pro tem* the facts as alleged by Iran to be true and in that line to interpret the relevant articles of the 1955 Treaty for jurisdictional purposes. That is to say, at the jurisdictional stage, the Court should see if on the basis of Iran's claims of the fact there could be a violation of the 1955 Treaty, op cit., supra n. 34, pp. 856, 856, paras 32, 38. In this Opinion, "to accept the facts" means to accept the evaluation by Iran of the context that the US attacks upon the oil platforms being used for commercial purposes. According to this view, the party that contests the facts, or the evaluation of the context in order to deny the applicability of the treaty in question like the US in the present case, even *pro tem*, would necessarily lose at the jurisdictional stage on this point. Such a serious result must be fully considered in the present case where the evaluation of the context of the dispute itself led to the difference between the parties as to the applicability of the 1955 Treaty, as discussed in the note 34).

41) Op cit., supra n. 11, pp. 819–820, paras 49–50.

42) On June 23 1997, the US filed its Counter-Memorial and set forth its Counter-Claim in it. The US contended that the Iranian attacks on the US vessels and other actions were violations of the 1955 Treaty. In this regard, the US itself asserted the applicability of the 1955 Treaty. While Iran criticized that the US sought to widen the dispute in order to include US claims concerning Iran's overall conduct throughout the period 1987–1988, ICJ found that the US Counter-Claim was admissible, Case Concerning Oil Platforms, Counter-Claim, *ICJ Reports 1998,* paras 4, 12, 46.

43) For instance, it is not clear whether what are "affected", according to the terms of proviso, are the treaties themselves or the parties to them. Case Concerning Military and Paramilitary Activities in and against Nicaragua, Jurisdiction of the Court and Admissibility of the Application, *ICJ Reports 1984,* p. 424, para 72；Eisemann, "L' arrêt de la C.I.J. du 26 novembre 1984（Compétence et recevabilité）dans l'affaire des activités militaires et paramilitaires au nicaragua et contre celui-ci," *Annuaire françiase de droit international,* 1984, pp. 381-382；D'Amato, A., "Modifying U.S. Acceptance of the Compulsory Jurisdiction of the World Court," 79 *The American Journal of International Law,* 1985, p. 394；Damrosch, L.F., "Multilateral Disputes," Damrosch, L.F., ed., *The International Court of Justice at a Crossroad,* 1987, New York, pp. 395, 398.

44) Case Concerning Military and paramilitary Activities in and against Nicaragua, Merits, *ICJ Reports 1986,* p. 94, para 175.

45) Ibid.

46) Op cit., supra n. 43, pp. 424-425, para 73.

47) In this regard, according to Judge Jennings, at the material times of this dispute, the substantive rules governing the behavior of the parties had been the United Nations Charter（the UN Charter）and the Charter of the Organization of American States（the OAS Charter）, Dissenting Opinion of Judge Jennings, *ICJ Reports 1986,* p. 533. Judge Oda pointed out that whether ICJ assumed jurisdiction and whether it could apply customary rules were different issues. In his view, ICJ should have proved that the present dispute had not arisen under multilateral treaties, in advance of discussing autonomous applicability of customary rules, Dissenting Opinion of Judge Oda, *ICJ Reports 1986,* pp. 217-219, paras 10-14.

48) Op cit., supra n. 44, p. 93, para 174.

49) Ibid., p. 94, para 176. In the SBT case, too, in determining the dispute, whether or not CCSBT has subsumed UNCLOS was discussed by the parties and AT.

50) Ibid., p. 95, para 178.

51) For this purpose of identifying conflicts between the parities under the customary rules, especially of determining whether there were any claims in the Nicaraguan Application that could be separated from dispute arising under multilateral treaties, as Judge Jennings suggested, it was required of the Court to examine the relevant customary rules, Op cit., supra n. 47, pp. 534 ff.

52) According to Judge Jennings, although Nicaragua made claims under customary rules, US did not countenance a dispute arising only under custom, ibid., p. 533. He argued this under the premise that this was a case in which customary rules and treaty rules were different in content. This is because he did not admit an existence of established customary rules that had the same content as the treaty rules had, especially Article 2 (4) and Article 51 of the UN Charter, ibid., pp. 530-532.

53) Op cit., supra n. 43, pp. 423-424, para 71.

54) In this regard, not only the US but also Nicaragua itself recognized that the

multilateral treaties had governed the dispute, Dissenting Opinion of Judge Jennings, op cit., supra n. 47, p. 533 ; Moore, J.N., "The Nicaragua Case and the Deterioration of World Order," 81 *The American Journal of International Law,* 1987, pp. 155–156. It is said that there was a contradiction in that while the US invoked the multilateral treaty reservation, it at the same time invoked the multilateral treaties, such as the UN Charter and the OAS Charter, Briggs, H.W., "The International Court of Justice Lives up to its Name," ibid., p. 80. However, the US intention was that the governing law of this dispute was the multilateral treaties, and, thus, according to the effect of the Vandenberg reservation, the Court was debarred to entertain the case. As for the similar position, D'Amato, A., "Trashing Customary International Law," ibid., p. 103.

55) When there is difference in content between customary rules and treaty rules, a question is whether the present dispute really has arisen under the customary rules. In such a case, ICJ should have had proven concretely, as the Court itself stated, that "the claim before the Court in this case is not confined to violation of the multilateral conventional provisions invoked."

56) See, for instance, Robinson, D.R., "Observations on the International Court of Justice's November 26, 1984 Judgment on Jurisdiction and Admissibility in the case of Nicaragua V. United States of America," 79 *The American Journal of International Law,* 1985, p. 427.

57) According to the position that the Vandenberg reservation strictly prohibits the interpretation of multilateral treaties, ICJ is even debarred to interpret the customary rules that are identical in content with the treaty rule, since in that case, the interpretation of the customary rules necessarily involves the interpretation of the treaty rules, Moore, op cit., supra n. 54, p. 156.

58) If ICJ interpreted the Vandenberg reservation as denying the Court's jurisdiction over cases which were governed by multilateral treaty rules, as substantive rules, it would be indispensable for the Court to confer some special status on the customary rules the content of which is similar to the treaty rules, in order to apply these customary rules to the present case. Such a special status is unknown to many international law scholars. From this point of view, Professor Christenson focused upon the significance of the Court's declaration in this case that some customary international rules were jus cogens rules, Christenson, G.A., "The World Court and *Jus Cogens,"* 81 *The American Journal of International Law,* 1987, pp. 93–94, 98. Compared to such a position, In the East Timor case, concerning the concept of *an obligation erga omnes* ICJ clearly declared that the *erga omnes* character of a norm and the rule of consent to jurisdiction were two different things, Case Concerning East Timor, *ICJ Reports 1995,* p. 102, para 28. On the other hand, there is a position to assert that when the customary rules are the same in content as the treaty rules, ICJ should apply them. *See,* for example, Greig, D.B., "Nicaragua and the United States : Confrontation over the Jurisdiction of the International Court," 66 *The British Year Book of International Law,* 1991, pp. 232–233.

59) Judge Shwebel stated that since US and Nicaragua were bound by the UN Charter and the OAS Charter, "it would be an artificial application of the law to treat them as if they were not bound (by the Charters), but bound only by customary international law," Dissenting Opinion of Judge Schwebel, *ICJ Reports 1986,* p. 304, para 95.

60) Christenson, op cit., supra n. 58, p. 97. Contra. Greig, op cit., supra n. 58, pp. 232-233；(the same position is at least implied in) Kirgis, Jr., F.L., "Nicaragua V United State as a Precedent," 79 *The American Journal of International Law*, p. 655；Damrosch, op cit., supra n.43, p. 396.

61) Such an intention of the US was confirmed also in other US contentions. The US contested the admissibility of the Application of Nicaragua for several reasons. The US asserted that adjudication of Nicaragua's claim would necessarily implicate the rights and obligations of other States, other States of Central America. For the US, other Central American States were indispensable parties in whose absence the Court could not properly proceed, op cit., supra n. 44, pp. 50-51, paras 86-87. As another reason for the inadmissibility of the Application of Nicaragua, the US pointed to the fact that Nicaragua had failed to exhaust the established processes for the resolution of the conflicts occurring in Central America, ibid., p. 60, para 102. In this context, the US contended that the allegations of Nicaragua comprised a complex of interrelated political, social, economic and security matters that confronted the Central American region, and that those matters were the subjects of a regional diplomatic effort, "Contadora Process," ibid., p. 60, para 103. Damrosch, op cit., supra n. 43, pp. 396-397.

62) Ibid.

63) Op cit., supra n. 9, para 24. The ICJ rejected the request for provisional measures by Libya by Order dated at 14 April 1992, Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie, Order in the Request for the Indication of Provisional Measures, *ICJ Reports 1992,* p. 3. (Libya V. Uited Kingdon), p. 114. (Libya V. United States of Amerina). As for an examination of jurisdiction of the Court at the stage, Chappez, J., "Questions d'interpretation et d'application de la convention de motréal de 1971 resultant de l'incident aérien de Lockerbie (Jamahiriya Arab Libyenne c. Royaume-uni) (Jamahiriya Arabe Libyenne c. Etats-unis) mesures conservatoires, ordonnance du 14 avril 1992," XXXVIII Annuaire française de droit international, 1992, pp. 475-476. Judge Oda indicated in a declaration appended to the Order that the rights protection of which was sought, were beyond the scope of the action. In his view, Libya's right to refuse extradition is a general sovereign right, and it has been fettered only by its acceptance of the principle of *aut dedere aut punire* under the Montreal Convention. Since the action before the Court related to the rights and duties under the Montreal Convention, ICJ should not have made the order requested, Declaration of Acting President Oda, *ICJ Reports 1992,* pp. 17-19, pp. 129-131.

64) *Reply,* pp. 22, 43, paras 48, 96；Award, pp. 68-69, para 41 (d).

65) In addition, the following point in the Judgment deserves to be mentioned. In the

submission, Libya asked the Court to find that：

> the United States is under a legal obligation to respect Libya's right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States.

The US denied that the Court had jurisdiction under Article 14 (1) of the Montreal Convention to decide the lawfulness of those actions in question and to hear the submission presented on this point by Libya. ICJ, rejecting the US contention, admitted its jurisdiction under the Convention to entertain this point of issue, op cit., supra n. 9, paras 33-34. In this regard, as for a view that ICJ did not recognized its jurisdiction to entertain the issues concerning the violation of Libya's rights under the UN Charter or the principles of general international law, Queneudec, J-P., "Observations sur le traitement des exceptions préliminaires par la C.I.J. dans les affaires de Lockerbie," XLIV *Annuaire française de droit international,* 1998, p. 315.

66) See, supra n. 11.

67) *Award,* p. 86, para 48.

68) Op cit., supra n. 11, pp. 811-812, paras 20-21.

69) Op cit., supra n. 37, pp. 78-79.

70) Judge Schwebel took the position that according to Article XXI (1) (d), the reach of regulation by the FCN treaty did not cover those matters, such as, international peace and security and domestic security interests. Therefore, according to him, the alleged US measures were not regulated by the FCN Treaty, Dissenting Opinion of Judge Schwebel, *ICJ Reports 1984,* p. 635, para 128；op cit, supra n.59, p. 310, para 105. In his view, ICJ interpreted Article XXI (1) (d) of the FCN Treaty as a substantive rule to determine the validity of US's characterization of the measures it had taken as within the provision, and it regarded disputes concerning that validity as one of the disputes in relation to the interpretation or application of the FCN treaty, and, accordingly, under the Court's jurisdiction, ibid., p. 311, para 106.

71) This was said to contradict the solid understanding established in American FCN treaty practices, Reisman, M., "The Other Shoe Falls：The Future of Article 36 (1) Jurisdiction in the Light of Nicaragua," 81 *The American Journal of International Law,* 1987, p. 170.

72) Op cit., supra n. 44, p. 135, para 270.

73) Ibid., pp. 135-136, para 271.

74) Ibid., p. 138, para 276.

75) Reisman, op cit., supra n.71, pp. 171-172. "The precedent thus set is that the Court has jurisdiction over a dispute that might fall within some of the literal terms of a treaty, without regard to the context, object or purpose of the treaty, if the treaty contains a compromissory clause referring to its interpretation or application," Kirgis,

Jr., op cit., supra n. 60, p. 656.

76) This assumption was grounded in voluminous FCN Treaty practices that US had accumulated, ibid.

77) The Electricity Company of Sofia and Bulgaria, Preliminary Objection, *PCIJ Series A./B.,* Fascicule No. 77.

78) *Reply,* pp. 46-47, paras 105-106.

79) There existed a difference of interpretation in regard to whether the Treaty established a broader material jurisdiction or not. *See,* for instance, Dissenting Opinion of Judge Hudson, *PCIJ Series A./B.,* Fascicule No. 77, p. 122；Separate Opinion of Judge De Visscher, *PCIJ Series A./B.,* Fascicule No. 77, p. 137.

80) Op cit., supra n. 77, p. 76. In the Court's opinion, "the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that contracting parties intended to open up new ways of access to the Court rather than to close old ways or to allow them to cancel each other out with the ultimate result that no jurisdiction would remain."

81) Judge Anzilotti and Judge Urrutia, took, in a sense, a deductive approach by presupposing a general principle that, in the same legal system, there could not at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences. Based upon this general principle, both judges did not admit "parallelism" of two compromissory clauses. Separate Opinion of Judge Anzilotti, *PCIJ Series A./B.,* Fascicule No. 77, p. 90；Dissenting Opinion of Judge Urrutia, *PCIJ Series A./B.,* Fascicule No. 77, p. 105. Compared to this, according to Judge Hudson, who was taking an inductive approach, ohly after it is decided that the two instruments containing compromissory clauses are applicable to the concrete case, the primacy of one of them can be determined. Dissenting Opinion of Judge Hudson, op cit., supra n. 79, pp. 123-125.

82) Some opinions in the Electricity Company of Sofia and Bulgaria case denied parallel existence of jurisdictional bases for a single fact, namely, submission of a dispute to PCIJ, Separate Opinion of Judge Anzilotti, op cit., supra n.81 p. 90；Dissenting Opinion of Judge Urrutia, op cit., supra n.81, p. 105. They did not permit that in the same legal system, two different rules attach different effects to the same fact. Such a position presupposes that the fact "submission of a dispute to PCIJ" is always treated as such, irrespective of context. This is different from an event that a fishing vessel of State A is captured by a vessel of State B on the high seas. Depending on its particular context, such an event may be defined as an intervention of a foreign vessel on the high seas or as an enforcement of a measure for conservation of living resources. There is nothing contained in the Separate Opinions other than that it must be denied that different rules provide different standards and requisites for a single fact, namely, submission of a dispute to PCIJ, from a viewpoint of integrity of a legal system. If a fact placed in a pertinent context constitutes a factor of a particular dispute, as a constitutive element of a particular dispute, can it be regulated by two

distinct rules? Or can only one rule be applied to it? With these issues, that are critical in the SBT case, those Separate Opinions in the Electricity Company of Sofia Bulgaria case have no bearing.

83) Articles 6 and 8 of CCSBT. The relevant provisions of CCSBT are reproduced in *Award,* pp. 12-21, para 23.

84) Articles 7 and 8 of CCSBT

85) *Order,* pp. 8-9, paras 28-29.

86) The Applicants also requested AT to adjudge and declare the following : that Japan shall refrain from authorizing or conducting any further experimental fishing for SBT without the agreement of A/NZ ; that Japan shall ensure that its nationals and persons subject to its jurisdiction do not take any SBT which would lead to a total annual catch of SBT above the amount of the previous national allocations agreed with A/NZ until such time as agreement is reached with those States on an alternative level of catch ; and that Japan shall restrict its catch in any given fishing year to its national allocation as last agreed in the Commission subject to the reduction of such catch by the amount of SBT taken by Japan in the course of its unilateral experimental fishing in 1998 and 1999, ibid., p. 9, para 28.

87) Ibid., pp. 11-12, paras 31-32.

88) Ibid., pp. 12-13, para 33.

89) As for provisional measures under UNCLOS, *see,* for example, Oxman, B.H., "Jurisdiction and the Power to Indicate Provisional Measures," Damrosch, op cit., supra n. 40, pp. 323-354 ; Laing, E.A., "A Perspective on Provisional Measures under UNCLOS," 29 *Netherlands Yearbook of International Law,* 1998, pp. 45-70 ; Eriksson, G., *The International Tribunal for the Law of the Sea,* 2000, The Hague/London/Boston. As for the provisional measures prescribed by ITLOS in the M/V "Saiga" (No. 2) case, Mahinga, J-G., "Les affaires du M/V Saiga devant le tribunal du droit de la mer," 104 *Revue générale de droit international public,* 2000, pp. 710-716.

90) ITLOS itself confirmed the requirement of *prima facie* jurisdiction of AT, Order, p. 15, para 40. Concerning this issue of ICJ, there are many works. *See,* for example, Thirlway, H.W.A., "The Indication of Provisional Measures by the International Court of Justice," Bernhardt, R., ed., *Interim Measures Indicated by International Courts,* 1994, Berlin, pp. 1-36, especially, pp. 16-23 ; Fitzmaurice, Sir G., *The Law and procedure of the International Court of Justice,* Vol. II, reprinted, 1995, Cambridge, pp. 533-544 ; Rosenne, Sh., *The Law and Practice of the International Court, 1920-1996*, Vol III, 1997, The Hague/Boston/London, pp. 1419-1459 ; Oda, Sh., "Provisional, Measures," Lowe, V., and Fitzmaurice, M., eds., *Fifty Years of the International Court of Justice*, 1996, Cambridge, pp. 541-556.

91) *Statement of Claim and Grounds on Which it is Bases by Australia* (*Statement of Claim by Australia*), pp. 10, 15-16, paras 18, 37 ; *Statement of Claim and Ground on Which it is Bases by New Zealand* (*Statement of Claim by New Zealand*), pp. 9, 14-15, paras 18, 37. *Order* para 45.

92) *Response of the Government of Japan to the Request for Provisional Measures & Counter-Request for Provisional Measures*（*Response of Japan*）, p. 22, para 47；*Order,* p. 16, para 42.
93) *Response of Japan,* p. 22, para 47.
94) Order, p. 16, para 43.
95) *Ibid.,* p. 16, paras 44-47.
96) Japan's denial of its breach of the provisions of UNCLOS was found solely in general remarks such that there were no international rules to prohibit EFP, or in the hypothetical context that this was a dispute of UNCLOS, *see*, for example, *Annex 17 to Response of Japan*.
97) Article 64 independently stipulates the following duty of cooperation. It is totally out of understanding why it is necessary for Article 64 to be read together with Articles 116 to 119 in order to prescribe an obligation of cooperation.
98) *Order,* pp. 16-17, paras 48-49.
99) Ibid., p. 17, para 52.
100) Ibid., p. 15, para 41.
101) Ibid., p. 17, para 50.
102) Ibid., p. 17, para 51.
103) Ibid., p. 17, para 55.
104) The contentions of the both parties reproduced by ITLOS are as follows：Japan argues that recourse to the arbitral tribunal is excluded because CCSBT provides for a dispute settlement procedure and A/NZ maintain that they are not precluded from having recourse to the arbitral tribunal since CCSBT does not provided for a compulsory dispute settlement procedure entailing a binding decision as required under Article 282 of UNCLOS.
105) If this phrase CCSBT "applies between the parties" means that substantive rules under CCSBT apply between the parties, nothing supportable is found in this view of ITLOS. C.f. similar remarks by ITLOS comcerning the substantive rules under both CCSBT and UNCLOS in paragraph 51 of Order.
106) *Order,* p. 18, para 62.
107) ITLOS itself confirmed these requirements, ibid., p. 19, para 67.
108) Ibid., p. 19, paras 68-69. This assertion of "immediacy" of harm also contends that there is an urgent need to preserve their rights.
109) *Request for Provisional Measures by Australia,* pp. 5-6, para 16；*Request for Provisional Measures by New Zealand,* pp. 6-7, para 16；*Statement of Claim by Australia,* pp. 24-26, paras 53-61；*Statement of Claim by New Zealand,* pp. 22-26, paras 53-61.
110) *Order,* p. 21, para 80. The relevant part of the measures will be also dealt with in the next part of this section.
111) Ibid., p. 18, para 63.
112) This author take the position relating to the interpretation of Articles 63 (2) and

64 under UNCLOS that they confer on coastal States only procedural rights to participate or require negotiations for the cooperation. Those provisions fall short of addressing situations where such international cooperation fails to agree on international conservation measures. The reason for this lack of substantial rules or standards prescribed under those provisions is that coastal States strongly have rejected the international rules or standards to be applied within an EZ, Kanehara, A., "A Critical Analysis of Changes and Recent Developments in the Concept of Conservation of Fishery Resources on the High Seas," 41 *The Japanese Annual of International Law,* 1998, pp. 20-25. As for the interpretation of the relevant clauses that prescribe the obligation of cooperation, *see,* for example, Lagoni R., "Principles Applicable to Living Resources Occurring Both within and without Exclusive Economic Zone or in Zones of Overlapping Claims," *Report of the Committee on the EEZ,* submitted to the Intemational Law Association, 1992, pp. 267-274 ; Oda, Sh., "Fisheries under the United Nations Convention on the Law of the Sea," 77 *The American Journal of International Law,* 1983, pp. 750-754 ; Lucchini, L., "La loi canadienne du mai 1994 : la logique extrême de la théorie du droit préférentiel de l'état cotier en haute mer au titre des stocks chevaichants," 30 *Annuaire française de droit itnernational,* 1994, pp. 864-867 ; Treves, T., "La pêche en haute mer et l'avenir de la convention des nations unies sur le droit de la mer," 38 *Annuaire française de droit international,* 1992, pp. 892-893 ; Burke, W.T., "Highly Migratory Species in the New law of the Sea," 14 *Ocean Development and International Law,* 1984, pp. 283-290.

113) According to Thirlway, when preservation of rights is required, it will have to be shown that the right is going to disappear, or conceivably that the subject of the right is going to vanish totally, so that the right could thereafter only have a sort of theoretical, *in posse,* existence, Thirlway, op cit., supra n. 90, pp. 7-8.

114) *Order,* p. 20, para 77.

115) Thirlway, op cit., supra n. 90, p. 7-8. For a while setting aside the question of the relation between rights of individuals and those of States on the international law plane, in the precedents of ICJ there are cases in which provisional measures have been indicated for the purpose of protection of rights of individuals to life. In the following cases, for the protection of rights of individuals, such as to life, for example, measures were requested, and ICJ indicated the provisional measures. Case Concerning United States Diplomatic and Consular Staff in Tehran, Order in Request for the Indication of Provisional Measures, *ICJ Reports 1979,* pp. 5-6, 17-18, paras 1-2,47. As for more controversial resent cases, Case Concerning the Vienna Convention on Consular Relations, Order in Request for the Indication of Provisional Measures (Paraguay v. United States of America), *ICJ Reports 1998,* paras 4, 8-9, 41 ; Case Concerning the Vienna Convention on Consular Relations, Order in Request for the Indication of Provisional Measures (Germany v. United States of America), *ICJ Reports 1999,* paras 5, 8-9, 29. In the Case Concerning Armed Activities on the Territory of the Congo, in the Application Congo contended that the armed aggression

by Uganda had violated the sovereignty and territorial integrity of Congo, and that the armed aggression involved the various human rights violations. ICJ recognized those rights in the Application and indicated the provisional measures for the purpose of the protection of them, Order in Request for the Indication of Provisional Measures (Congo v. Uganda), *ICJ Reports 2000,* paras 3-4, 40, 47.

116) *Order,* p. 19, para 70.

117) Dissenting Opinion of Judge Vukas, http：//www.un.org/Depts/los/ITLOS/3 Vukas.htm, para 5.

118) Hayashi, M., "The Southern Bluefin Tuna Case：Prescription of Provisional Measures by the International Tribunal for the law of the Sea," 13 *Tulane Law Journal*, pp. 384-385, Kanehara, N., op cit., supra n. 1, p. 18；Takada A., "Egekai Tairikudana Jiken——Karihozensochi——," (Aegean Sea Continental Shelf Case ——Provisional Measures——), *Hanrei Hyakusen* (*100 Cases in International law*), 2001, Tokyo, p. 203.

119) Separate Opinion of Judge Treves, http：//www.un.org/Depts/los/ITLOS/3 Teves.htm, para 8；Separate opinion of Judge Laing, http：//www.un.org/Depts/los/ ITLOS/3 Laing.htm, para 19.

120) *Statement of Claims by Austlaria,* p. 27, para 63；*Statement of Claims by New Zealand,* p. 26, para 63.

121) Kanehara, op cit., supra n. 112, pp. 20, 23.

122) In the Norwegian Fisheries Jurisdiction case, the fishing rights and the right to coastal fishing of a coastal State were opposed to each other, Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Order for Interim Protection, *ICJ Reports 1972,* pp. 12 ff；Fisheries Jurisdiction (Federal Republic of Germany V, Iceland), Order for Interim Protection, ibid., pp. 30 ff. The Applicants, the UK and Federal Republic of Germany in two independent but almost similar litigations, asserted that the Iceland's extension of the limits of its fishery jurisdiction would result in immediate and irremediable damage to *fishing and associated industries* of the Applicant States. Even if that kind of economic interests of individuals in question may be interpreted as the right of a State, whether such a right may be included in the fishing rights would be questioned. The fishing right has a stead ground in the traditional law of the sea, but its reach or coverage can be questioned. In this regard, *see,* Dissenting Opinion of Judge Nervo, ibid., pp. 16-17, 40-41；Perrin, G., "Les mesures conservatoires dans les affaires relatives a la compétence en matière de pêcheries," Revue générale de droit internaitonal, 1973, pp. 11, 15-16. Compared to this, in the Nuclear Test case, as being pointed out by Thirlway, the very existence of a right to redress for damage caused by fall-out from nuclear test was disputed, Thirlway, op cit., supra n. 90, pp. 23-24. In this case, while Australia claimed the sovereignty, its independent right to determine radio-active fall-out on its territory and the freedom on the high sea, ICJ indicated to preserve only the rights claimed by the Applicant in respect of the deposit of radio-active fall-out on her territory,

Nuclear Test Case (Australia v. France), Order in Request for the Indication of Interim Measures of Protection, *ICJ Reports 1973,* pp. 103, 105, paras 22-23, 30-31 ; *see,* also, Nuclear Test case (New Zealand v. France), Order in Request for Interim Measures for Protection, ibid., pp. 139-140, 141, paras 23-24, 31-32. As for the rights in question in these Nuclear Test cases, Bollecker-Stern, B., "L'affaire des essais nucléaires française devant la cour internationale de justice," XX *Annuaire française de droit international,* 1974, pp. 306-308.

123) Order, p. 21, para 81 ; as for the provisional measures prescribed, *ibid*., pp. 23-26, para 90. In the Fisheries Jurisdiction case, ICJ indicated provisional measures among which a measure was included that the UK should ensure that vessels registered in the UK would not take an annual catch of more than 170,000 metric tons of fish, op cit., supra n. 122, p. 17, para 26. This measure was indicated being based upon the available statistical information before the Court. Compared to this, ITLOS prescribed the provisional measure on the basis of the *agreed* level of the national allocations. This *agreed* level of national allocations was no doubt *agreed* within the framework of CCSBT and not calculated on the basis of the scientific or statistic information.

124) *Response of Japan,* p. 39, para 89.

125) Judge Warioba, from different point of view, criticized the provisional measure for the reason that unless ITLOS could conclusively assess the scientific evidence, it could not set forth a TAC. This opinion can also be seen as critical of the implied application of the precautionary principle in the *Order,* Declaration by Judge Warioba, http : //www.un.org/Depts/los/ITLOS/3 Warioba.htm.

126) *Award,* pp. 24-35, 49-83, paras 24-34, 38-44.

127) Ibid., pp. 52-53, para 38 (c) ; *Memorial,* pp. 57-59, paras 116-120.

128) *Award,* pp. 69-70, para 41 (e), *Reply,* p. 26, para 56.

129) *Award,* pp. 61-62, para 40, *Memorial,* pp. 78-79, 83-88, paras 162, 171-181.

130) *Award,* pp. 66-67, para 41 (c) ; *Reply,* pp. 48-53, 72-75, paras 109-127, 167-172.

131) *Award,* pp. 11-12, 85, 87-89, paras 22, 47 and 49.

132) Ibid., pp. 88-89, para 49.

133) Ibid., p. 89, para 50.

134) Ibid., p. 93, para 52.

135) Ibid., p. 90, para 51.

136) At the hearing, Japan explained the meaning of that CCSBT "supplants" or "covers" UNCLOS focussing upon particular activities that had triggered the present dispute, *Transcripts,* May 7, 2000, Morning Session, Remarks by Sir Elihu Lauterpacht.

137) *Award,* pp. 91-93, para 52. The arguing points here raised for consideration were as follows : general tendency of accumulation of treaty practices, combination of framework treaties and their implementing agreements ; parallelism of treaties, both in substantive contents and in their provisions for settlement of disputes arising thereunder ; the coverage and overlap of obligations under UNCLOS and CCSBT ; and the reach of regulation of both UNCLOS and CCSBT.

138) Ibid., pp. 11-12, 85, 87-89, paras 22, 47 and 49.
139) Ibid., pp. 89-90, para 50.
140) Ibid., p. 95, para 54.
141) Ibid.
142) Ibid., p. 104, para 63；Cf., Oxman, op cit., supra n. 4, pp. 296-297.
143) Ibid., pp. 84-85, para 46. In this regard, at the hearing, the Applicants formulated a dispute concerning the freedom on the high seas and contended that it was possible for substantial unilateral ex quota fishing of a depleted highly migratory species to constitute a breach of the articles of UNCLOS they relied on, *Transcripts*, May 8, 2000, Morning Session, Remarks by Mr. Bill Mansfield；Remarks by Prof. James Crawford.
144) *Reply,* pp. 15, 27, paras 37, 58. The relevant part reads：
> In these circumstances the Applicants contend that States are obliged to take action to conserve the stock. In the present case, this require States not to seek to catch above previously determined allowable levels and in particular not to do so if this would create a significant added risk of non-recovery.

145) *Award,* pp. 69-70, para 41 (e)；*Reply*, pp. 25-26, paras 54, 56.
146) Ibid., pp. 22, 25, paras 48, 52-53.
147) In Japan's *Memorial,* at para 87, Japan pointed out the following fact：A/NZ, in Diplomatic Note, informed Japan that the latter's action in recommencing unilateral experimental fishing "without the agreement of the other Parties to the CCSBT" had terminated unilaterally the negotiations. Japan emphasized that the reference in A/NZ Notes of the need for "the agreement of the other Parties to the CCSBT" was a manifestation of the fact that the dispute was really one of CCSBT. At para 98 Japan wrote "even if the complaints made by A/NZ regarding Japan's compliance with UNCLOS were contrary to Japan's contentions, ultimately to be held valid, such a determination would not, and could not, resolve the specific issue that really divides the parties in this case, namely, that of the limits of an acceptable EFP under the CCSBT, or for that matter, questions of TAC and national allocations."
148) *Award,* p. 105, para 65.
149) Ibid., pp. 60-62, para 40. At the hearing, Japan emphasized and developed this point, *Transcripts,* May 7, 2000, Afternoon Session and May 10, 2000, Morning Session, Remarks by Professor Vaughan Lowe.
150) *Statement of Claim by Australia*, pp. 29-30, para 69；*Statement of Claim by New Zealand*, pp. 28-30, para 69.
151) *Memorial,* pp. 84-85, para 174-175. Japan contended that setting TAC and imposing catch allocation on Japan were not even a legal matter, since TAC setting was a scientific and political matter.
152) *Statement of Claim by Australia,* pp. 23, 26, paras 54, 60；*Statement of Claim of New Zealand*, pp. 22, 25, paras 54, 60. A/NZ discussed the underlying obligation under UNCLOS when it dealt with Article 64 and 116 (a). As for the contention by the Applicants in this regard, *Reply*, pp. 26, 49, paras 56, 112.

153) *Award,* para 41 (e) ; *Statement of Claim by Australia*, p. 23, paras 54 ; *Statement of Claim by New Zealand*, p. 22, para 54 ; *Reply,* p. 26, para,56.

154) Ibid., pp. 84-85, para 46.

155) Oxman, op cit., supra n. 4, p. 295. Judge Keith, in his Separate Opinion denied the applicability of Article 16 of CCSBT to a dispute concerning the interpretation or application of UNCLOS. Therefore, according to him, Article 16 of CCSBT does (can) not "exclude further procedure" concerning a dispute of UNCLOS, ibid., paras 8, 15. This position was repeatedly shown by the Applicants, *Award,* p. 76, para 41 (i) ; Separate Opinion of Judge Keith, pp. 6-7, para 8. Nevertheless, the Applicants contended that they had exhausted an "exchange of views" provided in Article 283 of UNCLOS, by the consultation held according to Article 16 (1) of CCSBT. This meant that they exhausted an exchange of views concerning the dispute of UNCLOS in the consultation held within the framework of Article 16 of CCSBT, *see* for example, *Statement of Claim by Australia,* pp. 12-13, para 28 ; *Statement of Claim by New Zealand,* pp. 11-12, para 28.

156) *Award,* pp. 95, 100, paras, 54, 59.

157) Higgins, op cit., supra n. 34, paras 27 ff.

158) Resiman, op cit., supra n. 71.